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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 287

REMINGTON RAND, INC.,
Petitioner,

v.

ISABEL DYSART BUSH, DOROTHY DYSART FELLERS and SAMUEL CLAYTON DYSART,
Respondents.

REMINGTON RAND, INC.,
Petitioner,

v.

ISABEL DYSART BUSH, Administratrix d. b. n., c. t. a. of the Estate of Birney Dysart, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Remington Rand, Inc. respectfully prays the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered May 25, 1954 affirming a judgment filed July 22, 1952 in the District Court for the District of Connecticut. Petitioner seeks to review the decisions of the lower courts

only in so far as they refused to dismiss the actions under Rule 25(a)(1) of the Federal Rules of Civil Procedure.

Opinions Below

The opinion of the Court of Appeals in this case is not yet reported. The only opinion of the District Court pertinent to this petition was filed July 12, 1954, and has not been reported. The opinion of the Court of Appeals and that portion of the aforesaid opinion of the District Court dealing with the questions presented by this petition are set forth in the appendix.

Jurisdiction

Jurisdiction is invoked under 62 Stat. 928 (1948), 28 U. S. C. § 1254.

Questions Presented

1. Where, as here, the executrix of a decedent's estate has died during the pendency of actions at law for damages in which she is a party plaintiff, and substitution of a party for her is not made within two years after her death, does Federal Rule of Civil Procedure 25(a)(1) as construed in *Anderson* v. *Yungkau*, 329 U. S. 482 (1947), divest the district court of jurisdiction and require that the actions be dismissed?

2. In the circumstances stated above may a defendant entitled to question the jurisdiction of the district court under Rule 25(a)(1) waive, or be estopped from

raising the question solely by continuing to litigate the damages before a Special Master after expiration of the two-year period?

3. In the circumstances stated above may the court, in refusing to dismiss the actions under Rule 25(a)(1), add the legal representative of the deceased executrix as a party plaintiff in the actions under Rule 21, or is the court precluded from so doing by Rule 6(b)?

Federal Rules Involved

"Rule 25. Substitution of Parties.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district."

"Rule 21. Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

"Rule 6(b). Enlargement.

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them."

Statement

The total principal amount of the District Court's judgment represents the value, as found by the Special Master, of the use from 1924 to March 31, 1949 of an adding machine device invented by Birney Dysart, deceased, and used by petitioner Remington Rand, Inc. and its predecessor, Dalton Adding Machine Company under an express oral agreement made between Dysart and James L. Dalton in 1924 and assumed by Remington Rand in 1927 upon its acquisition of all of the issued and outstanding stock of Dalton Adding Machine Company (R. 98-99).

These are two actions at law for the fair value of the use of that device under the contract. One action # 3979 Law, brought by Eva Perin Dysart as executrix of Birney Dysart, is for the value of the use of the device from 1924 up to August 8, 1933 when, it is claimed, the invention was transferred out of his estate (R. 11, 25-28, 43). The other

action # 3978 Law, brought by the widow Eva Perin Dysart individually and the decedent's three children, is for the value of the use of the device from August 8, 1933 until September 17, 1952, the expiration date of the patent covering the device (R. 10-14, 43).

Both actions were commenced November 12, 1937 in the Superior Court of Connecticut, Hartford County, and removed to the District Court for diversity (R. 17-24, 31-39).

Pursuant to stipulation the actions were consolidated for trial, a jury was waived and the issues relating to petitioner's liability were tried first and separately before Judge Charles E. Clark sitting as a District Judge (R. 92-95).

Judge Clark rendered a decision in respondents' favor filed with his opinion July 11, 1941 (R. 96-112), reported at 40 F. Supp. 596, and interlocutory judgment was entered July 18, 1941 directing petitioner to account for the value of the use of the invention (R. 113-114). A Special Master was appointed by order filed October 2, 1941 to ascertain the extent and reasonable value of that use and the amount due each respondent (R. 115-116).

Eva Perin Dysart died December 30, 1945. Within the ensuing two year period admittedly no effort was made to substitute a necessary and proper party for her. On March 27, 1947 her estate was fully settled and distributed to her three children.

Although there were some hearings before the Special Master following his appointment in 1941, the period 1941 to January 1949 (except for a suspension thereof by mutual consent for the duration of hostilities during World War II), was devoted primarily to the compilation, pursuant to his direction, of records and data pertinent to the issue of

damages. Testimony upon that issue was not begun before the Special Master until the hearing of January 11, 1949, or approximately four years after Mrs. Dysart's death. The taking of this testimony terminated June 17, 1949. The petitioner first raised the point that no substitution had been made for Mrs. Dysart in its brief before the Special Master filed July 25, 1949. Isabel Dysart Bush was appointed administratrix d.b.n., c.t.a. of the estate of Birney Dysart on August 15, 1949.

On January 31, 1950 petitioner moved in the District Court to dismiss the actions as to Mrs. Dysart, both as executrix and as an individual under Rule 25(a)(1) (R. 274-275). Respondents served a supplemental complaint (R. 558-617), petitioner answered (R. 565-570), respondents moved for summary judgment (R. 572-575) and petitioner cross-moved for summary judgment (R. 620-721). These motions resulted in a decision by Judge Smith on July 12, 1951 (R. 790-801).

Judge Smith held that action #3979 Law (seeking damages for the period prior to Dysart's death in 1932), fell within the purview of Rule 25(a)(1) but that petitioner, by reason of its delay in raising the issue, had waived its right to object and was estopped from invoking the application of the rule. Accordingly, he refused to dismiss and, of his own motion, added Isabel Dysart Bush, as administratrix d.b.n., c.t.a. of Birney Dysart's estate, as a new party plaintiff under Rule 21 (R. 798-801).

In action #3978 Law (seeking damages for the period after Dysart's death), Judge Smith held that all rights to the invention and patent and all claims for its use after Dysart's death had been distributed out of his estate to Mrs. Dysart, who had thereafter assigned a one-quarter interest

therein to each of her three children; and that these children upon Mrs. Dysart's death took her remaining one-quarter interest under the Mutual Distribution approved by the Connecticut Court of Probate. Judge Smith concluded that by April 1947 Mrs. Dysart's children had acquired full legal title to the subject matter of action #3978 Law, and therefore it was unnecessary to substitute anyone for Mrs. Dysart in that action (R. 796-797).

The Court of Appeals, in affirming, agreed that failure to substitute in the second action was not fatal since, for the reasons stated by Judge Smith, substitution in that action was unnecessary. In sustaining Judge Smith's refusal to dismiss the first action, the Court of Appeals found that the petitioner knew of Mrs. Dysart's death as early as 1946; that if objection had been made at least prior to the hearings before the Special Master in 1949, those proceedings would have been greatly simplified and much time and expense saved; and that having stood by while the respondents expended money and effort in bringing the case to judgment, the petitioner should no longer be allowed to object that the required substitution had not been made.

Both the Court of Appeals and the District Court refused to sustain the petitioner's position that Rule 25(a)(1), as construed by this Court in *Anderson* v. *Yungkau*; *supra*, made mandatory dismissal of both actions and that Rule 25(a)(1) is jurisdictional and hence its operation cannot be waived.

Reasons For Granting The Writ

This case presents an important question of federal law, i.e., the meaning and applicability and reconciliation of three Federal Rules of Civil Procedure promulgated for

the guidance of the federal bar and the governance of the federal courts. Petitioner contends that the courts below have decided this question in a way in conflict with decisions of this Court which are directly applicable; but if those decisions should be held to be inapplicable, then the question presented is an open one which should be settled by this Court (Rule 19, Revised Rules of the Supreme Court of the United States, effective July 1, 1954).

I

In refusing to dismiss the actions the lower courts have given Rule 25(a)(1) a construction contrary to the interpretation accorded the rule by this Court in *Anderson* v. *Yungkau, supra,* which held that Rule 25(a)(1) is mandatory in operation and jurisdictional in effect, and that after the expiration of the two-year period a district court is without judicial power to entertain further proceedings.

The decision in the *Yungkau* case involved suits to recover stock assessments. The shareholders affected died during pendency of the actions and respondents became executors of their estates. Through no lack of diligence, petitioner failed to learn of these facts until more than two years later. Thereupon, petitioner promptly moved to revive the actions against the representatives of the decedents. The District Court denied the motions for revivor and granted motions of the executors to dismiss. The Circuit Court of Appeals, Sixth Circuit, affirmed by a divided court. This Court granted certiorari and affirmed the lower courts by a vote of 5-2, the Chief Justice and Justice Reed taking no part in the consideration or decision of the case.

Petitioner in the *Yungkau* case contended that since under Rule 25(a) substitution might be made within two years after the death of a party, such substitution was, within the meaning of Rule 6(b), an act "allowed" to be done "within a specified time" which the court might on a showing of "excusable neglect" permit to be done after the two year period. At that time, Rule 6(b) granted but two exceptions to the power of enlargement of time, i.e., it forbade enlarging the time for any action under Rules 59 and 73. Petitioner argued that since Rule 25(a) was not included in these exceptions, the time allowed by that rule for substitution might be enlarged under Rule 6(b).

In rejecting these contentions Mr. Justice Douglas, for the majority, after pointing out that even "within the two-year period substitution is not a matter of right; the court 'may' order substitution but it is under no duty to do so," went on to state (pp. 485-486):

> "In contrast to the discretion of the court to order substitution within the two-year period is the provision of Rule 25(a) that if substitution is not made within that time the action 'shall be dismissed' as to the deceased. The word 'shall' is ordinarily 'the language of command.' *Escoe* v. *Zerbst,* 295 U. S. 490, 493. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. See *United States* v. *Thoman,* 156 U. S. 353.
>
> Thus, as stated by the Circuit Court of Appeals, *Rule 25(a) operates both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period.* Rule 6(b) relates to acts required or allowed to be done by parties to an action and permits the court to

> afford relief to a party for his failure to act within the prescribed time limits. There would be more force in petitioner's argument if Rule 25(a) had, without more, set a two-year period within which substitution might be made. But Rule 25(a) does not stop there. *It directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party. And Rule 6(b) should not be construed to override an express direction of action to be taken by the court.* See *Wallace* v. *United States,* 142 F. 2d 240, 244." (Emphasis supplied.)

Since the decision in *Anderson* v. *Yungkau,* significant events have occurred which serve to reinforce the view that Rule 25(a)(1) is mandatory and jurisdictional. In its Final Report to this Court in June 1946, the Advisory Committee recommended that Rule 25(a)(1) be amended to give district courts discretion to order substitution after the expiration of two years. Not only was this recommendation not adopted, but instead Rule 6(b) was amended to state expressly that the time for taking any action under Rule 25 may not be extended. 4 Moore's *Federal Practice,* 504-505 (2d Ed. 1948).*

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*We are advised that the Advisory Committee in a preliminary draft of proposed amendments to the Rules published in May 1954 suggests the removal of the two-year time limitation in Rule 25(a)(1) and the elimination from Rule 6(b) of the provision that the time for taking action under Rule 25 may not be extended. This would result in granting the courts entire discretion to determine whether an action should be dismissed for delay in substitution. The proposal, of course, even if adopted, could not affect these actions since its operation would not, in any event, be retroactive. However, the very proposal of such an amendment in itself shows that the Committee regards present Rule 25(a)(1) as mandatory and jurisdictional in effect. It is also significant that the Committee in its notes to the proposed amendment refers to the opinion of the Court of Appeals in the instant case and indicates that the decision has created confusion regarding the application of Rule 25(a)(1)—an additional reason, we submit, why certiorari should be granted.

With the single exception of the lower courts here the federal courts have invariably followed *Anderson* v. *Yungkau*. See *Theard* v. *Fidelity & Deposit Co. of Maryland*, 202 F. 2d 880, 882, 883 (5th Cir. 1953); *Hofheimer* v. *McIntee*, 179 F. 2d 789, 791-792 (7th Cir. 1950), *cert. denied sub nom. Johnson* v. *McIntee*, 340 U. S. 817 (1950); *Fleming* v. *Sebastiani*, 161 F. 2d 111, 112 (9th Cir. 1947); *Blum* v. *Postal Telegraph*, 11 F. R. D. 500 (W. D. Pa. 1951); *United States* v. *Bush Const. Co.*, 109 F. Supp. 378 (E. D. Mich. 1953); cf. *Duebler* v. *Sherneth Corp.*, 160 F. 2d 472, 475 (2d Cir. 1947); *Pasos* v. *Eastern S. S. Co.*, 9 F. R. D. 279, 280 (Del. 1949).

Indeed, after expiration of the two-year period prescribed by Rule 25 a district court no longer has jurisdiction over the action as to a deceased party. In the analogous case of *Snyder* v. *Buck*, 340 U. S. 15 (1950) the Court held that substitution could not be made for a public officer after expiration of the six-month period prescribed in Section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941, now Rule 25(d), saying "the suit had abated in the District Court" (p. 21), and "[t]*he absence of a necessary party and the statutory barrier to substitution go to jurisdiction*" (p. 22). (Emphasis supplied.)

Thus the language, judicial interpretation and legislative history of Rule 25(a)(1) all show that where substitution has not been made within the two-year period, dismissal of the action is mandatory and thereafter the court is without jurisdiction.

It is believed that the contrary holdings of the lower courts in the cases at bar constitute serious error which, if left uncorrected, will create widespread uncertainty and confusion among lawyers and litigants alike regarding the

meaning and applicability of a most important rule of procedure operative throughout the federal courts.

II

Jurisdiction lost cannot be conferred by the parties; and the lower courts erred in holding that a party entitled to question jurisdiction under Rule 25(a)(1) may, solely by delay in doing so, waive or be estopped from raising the question.

It is true in part, as the Court of Appeals said, that the *Yungkau* case "characterized Rule 25(a) as a type of statute of limitations" and that a "statute of limitations can be waived."

But *Yungkau* went further. It expressly held that "Rule 25(a) operates *both* as a statute of limitations upon revivor *and* as a *mandate to the court* to dismiss an action not revived within the two year period." (Emphasis supplied.) In *Yungkau* the Rule was regarded as a statute of limitations in so far as it prescribes a two-year period after death during which appeal may be made to a district court's discretion to make substitution. Once the two-year period has expired, however, the Rule ceases to be a mere limitation upon the time within which application for substitution may be made, and becomes *"a mandate to the court to dismiss."* (Emphasis supplied.)

This "mandate to the court" may not be "waived" by a party, nor may a party by conduct be estopped from moving the court to invoke the mandate. As the Court stated in the *Yungkau* case, the dismissal of an action after expiration of the two year period prescribed by Rule 25(a) "is action required of the court, not of a party" and the Rule "is an express direction of action to be taken by the court." Surely

a party may not "waive" the "action required of the court" nor may the court decline to follow the "express direction" of the Rule, under some theory that the party moving the court to invoke the Rule has become estopped from so doing. As the Court said in *Snyder* v. *Buck, supra,* the Rule reflects "a declared policy of Congress not to be altered by an agreement of the parties or by some theory of estoppel" (p. 19).

The classic definition of a waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1937). But Rule 25 (a) created no private rights or privileges. Rather, it is a rule of judicial policy and economy for the governance of federal courts. Indeed it defines the jurisdiction of the district courts, for once the period for discretionary substitution has expired, the time for mandatory dismissal has arrived, and the court loses jurisdiction of the subject matter in so far as the claim of the deceased party is concerned. And it is axiomatic, of course, that no waiver or estoppel can clothe a court with jurisdiction over the subject matter of litigation which the court does not have or which it may have lost.

In holding that petitioner's delay in moving to dismiss constituted a waiver or estoppel the lower courts achieved a result which is clearly without warrant in view of *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590 (1927).

The *Claussen* case involved Section 11(a) of the Judiciary Act of 1925, the predecessor of present Rule 25(d) which provides that where a public officer who is a party to an action dies or is separated from office his successor may be substituted as a party "if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing or maintaining" the action.

As appears from the per curiam opinion in the *Claussen* case, that was a habeas corpus proceeding against Curran as Commissioner of Immigration. The writ was dismissed by order of the District Court entered February 1, 1926. An appeal was allowed on February 9, 1926 to the Circuit Court of Appeals for the Second Circuit. Curran resigned his office on March 31, 1926 and was succeeded by Benjamin M. Day. No motion for substitution was made. On December 14, 1926 the Circuit Court of Appeals entered judgment affirming that of the District Court. This Court granted certiorari on March 7, 1927. "Suggestion of abatement" was first submitted on January 6, 1928 while the appeal was pending in this Court. On January 9, 1928 this Court, finding that the six months' period within which a motion for substitution could have been made had expired, vacated the judgments entered in the District Court and in the Circuit Court of Appeals and remanded the cause to the District Court "with a direction to dismiss the cause as abated" (276 U. S. at 591).

It is clear from the foregoing statement of chronology that the dismissal of the cause in *Claussen* could have been had at any time after September 30, 1926, i.e., after the expiration of six months from March 31, 1926. Nevertheless, despite the more than one year's delay in raising the question, and regardless of the time and expense involved in permitting the case to continue its course through the Circuit Court of Appeals and to this Court, there was no finding of a waiver or estoppel to invoke the statutory requirement of dismissal.

Referring to the *Claussen* case in *Defense Supplies Corp.* v. *Lawrence Co.*, 336 U. S. 631 (1949) this Court said that the judgments of the lower courts were there

vacated because the statute there involved "made it unmistakably clear that the validity of the judgment was conditional upon substitution" (336 U. S. at 638).

Analagously here, the time for substitution having expired December 30, 1947, all proceedings thereafter in the lower courts in respect of the claim of Eva Perin Dysart, as executrix or individually, are without effect and the judgments below in respect of her claim are without validity and, as such, should be vacated. And petitioner's delay in moving to dismiss cannot be used to block the dismissal required by the inexorable operation of Rule 25(a)(1).

Where, as here, the "restriction is one which Congress has placed on the power of the District Court to act * * * it may not be waived by the parties" (*Ahrens* v. *Clark*, 335 U. S. 188, 193 (1947)); for, "lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties." *United States* v. *Griffin*, 303 U. S. 226, 229 (1937); and see, *Parker* v. *Ormsby*, 141 U. S. 81, 86 (1890).

Since Rule 25(a)(1) goes to jurisdiction, the objection of non-substitution may be made at any time, and, as the *Claussen* case shows, even in an appellate court, either by a party or by the court of its own initiative. Rule of Federal Civil Procedure 12(h); and see, *Hackner* v. *Guaranty Trust Co.*, 117 F. 2d 95, 97 (2d Cir. 1941), *cert. denied*, 313 U. S. 559 (1941).

Finally, if the applicability of Rule 25(a)(1) is made to depend upon considerations of "waiver" or "estoppel", it will cease to be the mandatory directive it now is and its application will be made to depend upon the precise facts of each individual case and, indeed, upon whether or not the particular judge sitting in the case believes that it would or

would not be equitable to dismiss. Thus, Rule 25(a)(1) would be made discretionary in application and would, in effect, be amended in the very respects in which the Court has already declined to amend it (p. 10, *supra*). We suggest it would be to invite chaotic disorder in judicial administration to permit a "mandate" to be thus frustrated by the very courts to whom it is directed.

III

Since the lower courts correctly held that action #3979 Law falls within Rule 25(a)(1), they erred in refusing to dismiss that action and in circumventing Rule 25 by resort to Rule 21.

The District Court and the Court of Appeals held that action #3979 Law falls within the purview of Rule 25(a)(1) (R. 798). Nevertheless, Isabel Dysart Bush, administratrix d.n.b., c.t.a. of the estate of Birney Dysart, was added as a party plaintiff in that action after expiration of the two-year period, purportedly under Rule 21, to represent the interest formerly represented by Mrs. Dysart as executrix (R. 800).

Obviously, this addition of a party under Rule 21 is really nothing more than the very substitution prescribed by Rule 25(a)(1). Mrs. Dysart, as executrix of the estate of Birney Dysart, sued on Dysart's claim against petitioner for the years prior to Dysart's death in 1932 (Find. 15; R. 104). Mrs. Bush, as administratrix d.b.n., c.t.a. of the estate of Birney Dysart, has now recovered judgment on that same claim (R. 1125-1128). Mrs. Dysart theoretically is still a party to this action, since the motion to dismiss as to her was denied (R. 800). Yet, she is not mentioned, as a party or otherwise, in the judgment. Clearly, then, the District Court

regarded Mrs. Bush as having been substituted for Mrs. Dysart.

This Court is therefore squarely faced with the question whether a party who may not be substituted under Rule 25 may in effect be substituted under Rule 21.

We submit that the policy of Rule 25 may not thus be defeated. So to interpret Rule 21 would mean, for all practical purposes, to write Rule 25 off the books. Under the District Court's interpretation a new party could be substituted for a deceased party at any time after the two year period had expired simply by admitting the new party under Rule 21. This is almost the exact procedure proposed in the 1946 amendment to Rule 25 which was rejected.

The Seventh Circuit has held that the policy of Rule 25 cannot be avoided by other more general Federal Rules. In *Hofheimer* v. *McIntee, supra,* after the two year period had expired appellant sought to be substituted for a deceased party under the intervention procedure of Rule 24. The court held intervention would not be granted because after the two year period the district court lost jurisdiction and "there was nothing left in which the movant could intervene."

There is no material difference between that situation and this. Here, two years after Mrs. Dysart's death the District Court lost jurisdiction as to her in her individual and executorial capacities. Thereafter Mrs. Bush as administratrix d.b.n., c.t.a., representing the claim in Dysart's estate, could not be admitted as a party under Rule 21, for there was then no longer any action on this claim before the court to which she could be admitted.

Where, as here, the court has lost jurisdiction as to a party or claim, joinder will not be permitted under Rule 21.

> "In so far as [Rule 21] relates to the addition of parties it is intended to permit the bringing in of a

person who, through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable; it is not intended, by this rule, to enable a plaintiff to bring back into the case, as defendants, persons who had been joined as such at the outset of the action, but against whom the right to continue the action has abated." *Truncale* v. *Universal Pictures Co.*, 82 F. Supp. 576, 578 (S. D. N. Y. 1949).

For these reasons, we submit, the Courts below erred in holding that Rule 25(a)(1) does not make mandatory the dismissal of action #3979 Law and that the command of Rule 25 can be avoided by resort to Rule 21.

IV

The courts below also erred in holding that Rule 25(a)(1) did not require dismissal of action #3978 Law. In so doing they decided an important state question in a way in conflict with applicable state law.

The lower courts were in error in treating plaintiffs' claim as two-fold. The claim made the basis of both actions is single and indivisible and was held in its entirety by Mrs. Dysart as executrix of Birney Dysart. Therefore, the failure to substitute a proper party for Mrs. Dysart within two years after her death made dismissal of both actions mandatory under Rule 25(a)(1).

As we have said, these are actions arising out of an express oral contract made between James L. Dalton as president of Dalton Adding Machine Company, and Birney Dysart in 1924. Remington Rand is here sued upon its agreement of 1927 in which it assumed certain liabilities under the oral contract.

These are not actions for patent infringement or other rights arising out of Dysart patent application No. 565. Plaintiffs' rights in the application, and later in the patent, are separate and distinct from their rights under the contract of Dysart with Dalton. Against Remington Rand, the contractual user of the device, the rights of the plaintiffs must be determined by the agreement and not under the patent laws. See *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255, 260 (1897); *International Burr Corporation* v. *Wood Grinding Service*, 34 F. 2d 905, 909 (2d Cir. 1929); *Sbicca-Del Mac* v. *Milius Shoe Co.*, 145 F. 2d 389, 400 (8th Cir. 1944); *Saco-Lowell Shops* v. *Reynolds*, 141 F. 2d 587, 596 (4th Cir. 1944); *Carbo-Frost, Inc.* v. *Pure Carbonic, Inc.*, 103 F. 2d 210, 223 (8th Cir. 1939), *cert. denied*, 308 U. S. 569 (1939).

Hence, Dysart at his death was the holder of an express contract claim against Remington Rand as the permissive holder of the Dysart device. He was also the holder of a separate bundle of rights arising from his patent application No. 565. These latter rights permitted him to license others to use the device and, after the patent was issued, to sue for infringement. And upon Dysart's death his contract claim against Remington Rand became a distinct and separate asset of his estate as did his rights under his patent application. But the contract claim must be distinguished from the rights under the patent application or the patent. Although *the patent rights* have been distributed out of the Dysart estate, *the contract claim*, which is the subject matter of these actions, has never been so distributed.

This distinction between a permissive user of a patented device and a wrongful user, an infringer, has been recognized by this Court since 1875. See, *Packet Company* v. *Sickles*, 86 U. S. 611 (1873).

The District Court and the Court of Appeals have failed to make this distinction between the contract claim and the patent rights; and, treating them as one, have held that only that part of the claim for the period 1924 to 1932 remains in the Dysart estate, whereas that part of the claim covering the period 1932 to date was distributed to Mrs. Dysart and then assigned by her in part to her three children (R. 796-798).

This conclusion is erroneous for these reasons:

(a) Under Connecticut law there can be no distribution of non-inventoried assets of an estate. The contract claim against Remington Rand was not inventoried as an asset of the estate of Birney Dysart until 1937 and again later in 1949. Therefore, no distribution of it could have been made to Mrs. Dysart in 1933.

An Inventory and Supplemental Inventory were filed in 1933 by Mrs. Dysart, as executrix of Birney Dysart's estate, in the Hartford Probate Court and were accepted by that Court in 1933. These inventories listed Patent Application No. 565 as an asset of Dysart's estate. No reference was made to Dysart's contract claim against Remington Rand (R. 791-792, 652-655).

An administration account was filed by Mrs. Dysart, as executrix, and approved by the Probate Court on March 28, 1933. Dysart's contract claim against Remington Rand appeared nowhere in the administration account (R. 792, 798, 657-659). Distribution of the assets of the estate was made in accordance with the will (R. 792, 661). Since Dysart's contract claim against Remington Rand was never inventoried and never appeared in the administration account it could not have been distributed to Mrs. Dysart under Connecticut law. *Bankers Trust Co.* v. *Greims,* 110

Conn. 36, 42-43, 147 Atl. 290 (1929); Cleaveland, Hewitt & Clark, *Probate Law and Practice of Connecticut,* 769 (1915); 2 Locke & Kohn, *Connecticut Probate Practice,* 243, 742-743 (1951).

(b) The District Court found and respondents admit that in 1937 a supplemental inventory was filed listing for the first time as an undistributed asset in Dysart's estate "Claim against Remington Rand Inc., value indeterminate." Later and in 1949 another supplemental inventory was filed in Birney Dysart's estate listing as an undistributed asset thereof "Claim against Remington Rand Inc., value indeterminate" (R. 792-793, 663, 668).

There is nothing in these inventories to indicate that the listed claim is only for the period 1924-1932. To the contrary, by its very terms the claim listed is the *entire* "Claim against Remington Rand, Inc." and hence is for the period after 1932 as well as before. Therefore, plaintiffs' own inventories and the Court's findings show that the entire contract claim here sued upon remains in the Birney Dysart estate.

Respondents argued below that the order distributing Dysart's estate to Mrs. Dysart in 1933 included the contract claim against Remington Rand. Judge Smith properly held that this could not possibly be so as regards the period 1924-1932, since neither the 1932-1933 inventories nor the administration account made any reference whatever to that claim, and the supplemental inventories of 1937 and 1949 each listed the claim as still an undistributed asset of the estate (R. 798).

Judge Smith and the Court of Appeals failed to realize, however, that upon the same reasoning the contract claim

for the period 1932 to date also still must remain in the Birney Dysart estate, for the claim for that period is not included in the 1932-1933 inventories nor in the administration account, whereas the 1937 and 1949 inventories, which include the claim, are applicable to the period after 1932 as well as to the period before.

CONCLUSION

For the foregoing reasons, it is submitted that the Court of Appeals for the Second Circuit has misconstrued and misapplied Rules 25(a)(1), 21 and 6(b) and, in so doing, has misinterpreted and, in effect overruled, controlling decisions of this Court; and that a writ of certiorari should issue accordingly for a review at the hands of this Court.

Dated: New York, N. Y., August 6, 1954.

Respectfully submitted,

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APPENDIX

A.

Opinion of Court of Appeals

Before:

Chase, *Chief Judge,*
Augustus Hand, *Circuit Judge,* and
Gibson, *District Judge.*

Appeal from the United States District Court for the District of Connecticut, J. Joseph Smith, *District Judge.*

Joint actions by Isabel Dysart Bush, Dorothy Dysart Fellers, Samuel Clayton Dysart, and by Isabel Dysart Bush as Administratrix d.b.n., c.t.a. on the estate of Birney Dysart, against Remington Rand, Incorporated, brought to recover for the reasonable value of the use by Remington Rand, Inc. of a mechanical device invented and patented by Birney Dysart, father of the present plaintiffs. Judgment was entered for the plaintiffs in the total amount of $1,220,001.59 (including interest accrued to the date of entry) plus interest and costs. Judgments affirmed.

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GIBSON, *District Judge*:

There are two actions of contract brought (a) by two daughters, Isabel Dysart Bush and Dorothy Dysart Fellers, and one son, Samuel Clayton Dysart, of Birney Dysart, against Remington Rand, Incorporated; and (b) by one daughter—Isabel Dysart Bush, Administratrix d.b.n, c.t.a. of estate of Birney Dysart, against the same defendant. The gist of the action, in each case, is identical. Henceforth, except as to one alleged error, the term "plaintiff" will be used to denote all the plaintiffs in the combined actions.

The plaintiff's complaint contained two counts. It alleged, in its first count, the following: Birney Dysart, on or about December 25, 1919, invented an automatic credit balance device to be used in connection with, and as part of, adding, bookkeeping or other business machines.

Sometime between November, 1923, and May, 1924, Birney Dysart, the owner of this invention and the applicant for a patent thereon, agreed with the Dalton Adding Machine Co. of Norwood, Ohio, that the Dalton Co., pending the issuance of letters patent upon this invention, might use it, for a consideration to be agreed upon within a reasonable time after the issuance of letters patent, and the Dalton Co. further agreed, as part consideration for its use, to pay all costs relative to the issuance of the patent.

On or about May 9, 1927, the defendant purchased all assets and assumed all liabilities, immediate or contingent, of the Dalton Co. The Dalton Co. paid charges and costs relative to the issuance of the patent until its purchase by defendant. The defendant has, since its purchase of Dalton Co., paid none of the charges or costs of obtaining the patent. Letters patent on the invention were issued on September 17, 1935.

Since September, 1924, the Dalton Co.—and the defendant—used this invention in the manufacture of, and as part of, a large number of adding, bookkeeping and other busi-

ness machines. Yet since the issuance of the patent, the defendant has made no attempt to agree with Birney Dysart, his representative, or his heirs (the plaintiffs) concerning compensation for such use, for which compensation was asked in the first count.

The second count asked for an accounting and disclosure of the number of machines sold by the Dalton Co.—and defendant—which were equipped with this invention and manufactured and sold by the Dalton Co. and defendant, and asked for judgment for the amount found due on such accounting.

This complaint was dated November 8, 1937, and was entered in the Superior Court at Hartford, Connecticut. On motion of the defendant, the action, on December 22, 1937, was removed to the Federal Court. After sundry motions—to expunge—to strike—the defendant filed, on November 1, 1938, its answer. This answer contained a general denial and twelve special defenses. After further motions and hearings thereon, on March 8, 1940, the special defenses were boiled down to those of shop right, license, legal or equitable title, fraud and estoppel.[1]

Both parties finally having agreed to trial by court, trial was had before Judge Clark commencing April 28, 1941. On July 11, 1941, Findings of Fact and a Memorandum of Law were filed in favor of the plaintiffs. *Dysart et al.* v. *Remington Rand, Inc.*, D. C., 40 F. Supp. 596. Liability to the plaintiff was predicated on an express promise on the part of the Dalton Co., assumed by the defendant when it merged with the Dalton Co., to pay the reasonable value for the use of the Dysart device. Accordingly, on July 18, 1941, an interlocutory judgment was entered. This interlocutory judgment ordered the defendant to account to the plaintiff for the reasonable value of the use of the patent made by it and the Dalton Co.—and referred the

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[1]Earlier phases of this action may be found at 25 F. Supp. 293; 31 F. Supp. 296; 32 F. Supp. 477; 40 F. Supp. 596.

case to a Special Master to ascertain the extent of such use, the reasonable value thereof, and the amounts due each of the plaintiffs—and awarded costs to the plaintiff.

On October 2, 1941, Charles M. Lyman, Esquire, was appointed Master. Apparently it took the parties a great deal of time to gather together all the necessary factual data—because it was not until early in 1949 that hearings on the merits were held before the Master, and these continued until mid-June of that year. The Special Master's first report was dated December 17, 1949. All parties filed exceptions to the first report of the Master and, after a lengthy hearing, Judge Smith, on July 10, 1951, recommitted the matter to the Master to make additional findings and corrections in the report.

On December 3, 1951, the Supplementary Report of the Special Master was signed. Objections were filed and a Second Supplementary Report was signed by the Master on April 4, 1952. Objections to the reports filed in the District Court were overruled on June 26, 1952, and on July 21, 1952, judgment was entered in favor of the plaintiff to the following effect:

Isabel D. Bush, as Administratrix d.b.n. c.t.a. of the Estate of Birney Dysart....	$142,717.91
Isabel D. Bush	359,094.56
Dorothy D. Fellers	359,094.56
Samuel C. Dysart	359,094.56

Costs were awarded the plaintiff.

It is from this judgment that defendant appeals. We have gone into the history of this case at some length—since more than sixteen years have elapsed since the commencement of this action. We have not attempted to enumerate the nearly countless motions that have been filed—and contested. Suffice it to say, the record indicates that this action has been staunchly contested every inch of its

way. And it will be necessary, in discussing the defendant's exceptions, to consider in detail certain other historical aspects of this case.

The first error assigned by the appellant is that the plaintiffs are estopped from prevailing in this action because of Birney Dysart's alleged misrepresentations at the time of the merger of the Dalton Co. with the defendant, and his failure to disclose his agreement with the Dalton Co. and his then pending patent application.

In considering this claim of error, we are governed by two principles—first, we must sustain Judge Clark's finding that there was neither actual nor imputable fraud if there is any substantial evidence in support thereof. *United States* v. *Aluminum Co. of America,* C. C. A. 2, 148 F. 2d 416, 433; Rule 52, Federal Rules of Civil Procedure. Such inferences as the Trial Judge drew—in this matter—are not binding upon us, but they are entitled to substantial weight and, so far as reasonable, should be given effect here. *United States* v. *Fotopulos,* C. C. A. 4, 180 F. 2d 630; Rule 52, Federal Rules of Civil Procedure.

In addition, the defense of estoppel by fraud is an affirmative defense. The defendant had the burden of proving that Birney Dysart was guilty of all of the elements of fraud. Rule 8(c) of Federal Rules of Civil Procedure.

Guided by these principles, it is clear there was no error by the Trial Court in denying the defendant's contention as to estoppel by fraud.

Defendant's argument therein is twofold. It first charges that the report of the auditors stating that "No contingent liabilities were reported to nor disclosed by us during the course of our examination and a responsible official of the Company certified to us that none existed at December 31, 1926." was an affirmative misrepresentation on the part of Dysart, since he was the Treasurer and the one who signed the financial statements underlying this report.

The Trial Court found as follows:

> "On February 21, 1927, as secretary of the Dalton Company, Dysart signed several certifications on forms presented to him by Ernst & Ernst, accountants engaged in making an audit report of the Dalton Company as of December 31, 1926. These certifications were as to the inventory, accounts receivable, liabilities, and purchase and sale commitments of the company; that one which dealt with liabilities stated that to the best of the certifier's knowledge and belief provision had been made on the books of account for all liabilities except certain invoices noted, and that the company was not liable as endorser or guarantor on any accommodation paper, contract, or agreement, had not pledged or assigned any of its assets, 'had no outstanding contracts of a speculative nature for material or other items; had no damage or losses on account of discounted notes, trade acceptances or other forms of obligations.' These certifications were not brought to the attention of defendant's officers, but Ernst & Ernst's audit report, which came to their attention a few days after March 2, 1927, stated that no contingent liabilities were reported to or disclosed by them during their examination, 'and a responsible official of the Company certified to us that none existed at December 31, 1926.' At that time (about March 5, 1927) all arrangements for the sale had been completed, and in the announcement of February 14, 1927, no reference had been made to contingent liabilities in the pro forma balance sheet or elsewhere. In making the purchase of the Dalton assets, defendant was interested in Dalton's favorable income-showing and strong patent situation, and did not know of or rely on these certifications made by Dysart."[2]

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[2]*Dysart et al.* v. *Remington Rand, Inc.*, 40 F. Supp. 596, 598.

Assuming—but not deciding—that the statements on the certifications described in Finding 10—which were signed by Dysart—amounted to a misrepresentation, it is still necessary—in order to have an estoppel by fraud, to find either an intent to defraud or to find that Dysart's act was so grossly negligent as to amount to fraud. Compare *O'Connor et al.* v. *Ludlam et al.*, C. C. A. 2, 92 F. 2d 50, 53, cert. den. 302 U. S. 758, 58 S. Ct. 364, 82 L. Ed. 586. The Trial Judge found neither actual nor inferential fraud. Certainly the facts found by the trier are adequately supported by the evidence. The inferences drawn by the trier are to be given substantial weight.

A fundamental essential to a valid defense of fraud is that the defendant must show that it relied on the alleged misrepresentation. *General Finance Corp. et al.* v. *Keystone Credit Corp. et al.*, C. C. A. 4, 50 F. 2d 872, 881. The burden was on the defendant to prove that element. Judge Clark found, in the last sentence of Finding 10, noted above, that defendant did not know of or rely on these certifications made by Dysart. Such a finding is warranted from the evidence.

Furthermore, it is far from clear that the statement to the auditors had been correctly interpreted by them to mean that there were no contingent liabilities. There was no certainty at the time of the merger early in 1927, that letters patent would ever issue on this invention. There is a difference between a contingent liability and a plain "contingency." "A contingent liability is one thing, a contingency, the happening of which may bring into existence a liability, is another, and a very different thing. In the former case there is a liability which will become absolute upon the happening of a certain event; in the latter there is none until the event happens. The difference is simply that which exists between a conditional debt or liability and none at all." *Fernald* v. *Johnson*, 71 Me. 437, 440. Certainly we cannot find that defendant sustained the burden of proving it relied on these statements in making the deal of merger.

The burden being on the defendant on this question—we cannot find it has sustained it.

Nor do we find any substance to the defendant's contention that Dysart's silence constituted an estoppel by fraud. The situation in which Dysart acted is clear enough. Although he was Treasurer of the Dalton Co., he had no part in the negotiations with Rand. He was not consulted. He knew that Landsiedel, then President of the Dalton Co. and who alone carried on the negotiations for the Dalton Co. with Rand, knew about his contract with the Dalton Co.

To be charged with estoppel by silence, Dysart must have been under a duty to speak—or to have known that the defendant was acting under a mistaken belief. *Sinclair Prairie Oil Co.* v. *Campbell et ux.*, C. C. A. 5, 164 F. 2d 907, 910.

Since he was not a party to the negotiations, or in any way in a fiduciary relationship with Remington Rand, he had no duty to speak. He had every right to rely on Landsiedel's duty of disclosure. Nor is there an iota of evidence either to indicate that Dysart knew the defendant was ignorant of Dysart's rights in his patent or that the defendant was acting under a mistaken belief. And the burden was on the defendant to show any such situation.

The second point urged by the defendant is that recovery is barred by the Connecticut three-year or six-year statutes of limitations governing oral contracts. This contention is easily disposed of, as Judge Clark found,[3] that the issuance of the patent was an absolute condition to liability under the contract. Thus the cause of action did not arise until

[3] "* * * When the Dalton Company sought to make use of the invention in 1924, the president and general manager thereof, James L. Dalton, the dominant factor in the management of the company and with his family the chief stockholders, agreed with Dysart that the company should use the invention and that the company would compensate Dysart for the use when its value became ascertained after issuance of the patent for it. * * *" *Dysart et al.* v. *Remington Rand, Inc.*, 40 F. Supp. 596, 597.

that contingency was fulfilled and as such, any statute of limitations could not begin to run until such time. Since the patent did not issue until September 17, 1935—less than three years before the commencement of this action in November, 1937—the action is not barred by either the three- or six-year limitation.

The defendant's claim that the plaintiffs unequivocally accepted the claimed repudiation in 1934, when they granted a license to Underwood-Elliott-Fisher and thereby rendered themselves incapable of performing the Dysart-Dalton Co. agreement, is equally untenable.

The contract as found by Judge Clark in Finding 5[4] did not provide that Dysart should be in a position to assign complete rights in the patent to the Dalton Co. The Dalton Co. contracted to pay Dysart the fair value, to be agreed upon, for the use of the patent. There was no provision in the contract to assign the patent when issued. Intention is an inference of fact for the trier, and his conclusion is not reviewable unless it was one he could not reasonably make. *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150; *McDermott* v. *McDermott*, 97 Conn. 31, 34-5; *Finlay* v. *Swirsky*, 98 Conn. 666, 671. Indeed the trial judge was fully justified in finding the contract as he did.

Defendant's next claim concerns Rule 25 (a) of the Federal Rules of Civil Procedure which directs dismissal of an action as to a deceased party if proper substitution for the party is not made within two years. The rule is sought to be invoked against the interests represented by the wife of the inventor Birney Dysart, Mrs. Eva Perin Dysart, at the time she died on December 30, 1945. She was then a party to the proceedings in two capacities. As Executrix of the estate of Birney Dysart, who died on July 20, 1932, she was the sole plaintiff in the action to recover the reasonable value of the use up to August 8, 1933, the date

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[4]See Footnote 3, *supra*.

when Dysart's estate was distributed. In the second action brought to recover the value of the use after August 8, 1933, she was party plaintiff to the extent of a one-quarter interest in the recovery. Although sole legatee of Dysart's estate, in 1935 she had transferred a three-quarter interest in equal parts to her three children, who were also plaintiffs in this second action.

Within the two-year period after Mrs. Dysart's death in 1945, no effort was made to substitute for her interests, and on March 27, 1947, her estate was fully settled and distributed to the three children, full state and federal tax liability having been paid. Over four years after her death, on January 11, 1949, hearings on the merits before the Special Master were commenced. Her death was suggested on the record on January 19, 1949, and the hearings terminated on June 17, 1949. Although defendant had knowledge of Mrs. Dysart's death as early as 1946, no attempt was made to raise the issue of no substitution until defendant filed its original brief before the Master on July 25, 1949, after the completion of the hearings. Not until January 31, 1950, was a motion made in the District Court under Rule 25 (a) to dismiss the actions as to her, both as Executrix and individually. The Special Master found little merit in the defendant's arguments, and Judge Smith, in his memorandum on the Master's report filed July 10, 1951, denied the motion to dismiss. He found that failure to substitute in the second action was not fatal, since under the distribution of Mrs. Dysart's estate in April, 1947, full legal title to the claim against the defendant passed to the children, and the children were already parties to the action. However, as to the first cause of action in behalf of Birney Dysart in which Mrs. Dysart was the sole representative, he found that since inventories of his estate listed the claim as late as 1949, and taxes remained to be settled and paid, the claim still reposed in the estate. Thus legal title rested with the personal representative of the estate and only such a representative was the proper party to

enforce the action. *Butler* v. *Sisson,* 49 Conn. 580; *Lynch* v. *Skelly,* 138 Conn. 376, 379. Since the personal representative had not been made a party, dismissal under Rule 25 (a) would ordinarily follow, but he found that the defendant, by its long delay in raising the issue, had waived its right to object and was estopped from invoking the rule. Thus, pursuant to Federal Rule 21, which permits the District Court to add or drop parties at any stage of the proceeding on such terms as are just, he allowed the daughter Isabel D. Bush, Administratrix d.b.n.-c.t.a. of the estate of Birney Dysart under Probate Court decree of August 16, 1949, to be added as party plaintiff in the first action.

We can see no error in this decision. The defendant knew of Mrs. Dysart's death as early as 1946, and if objection had been made at least prior to the hearings in 1949, those proceedings would have been greatly simplified and much time and expense would have been saved. Having stood by while the plaintiffs expended money and effort in bringing the case to judgment, the defendant should no longer be allowed to object. The defendant, in disputing this decision, relies on *Anderson* v. *Yungkau,* 329 U. S. 482, 67 S. Ct. 428, 91 L. Ed. 436, where, in a suit to recover certain stock assessments, the Court ruled that dismissal under Rule 25 (a) after two years was mandatory. Although the failure to substitute was due to no lack of diligence on the part of the plaintiff-receiver, the Court held that there was no power, under the excusable neglect provision of Rule 6 (b), to extend the time within which the executors of some of the defendant stockholders who had died could be substituted. On the basis of this decision, the defendant argues that Rule 25 (a) is jurisdictional; that the operation of the Rule cannot be waived by conduct of the parties.

However, we do not think the *Yungkau* case is controlling here where the issue is not discretion of the Trial Court but waiver by the parties. In ruling that dismissal was mandatory, the Court characterized Rule 25 (a) as a

type of statute of limitations. See 329 U. S. at 485. Moreover, in that decision Rule 25 (a) was used to protect the repose of the estate of the defendant, but here it is being used only to bar the plaintiff's immediate remedy. As such it more clearly appears to take the form of a limitation statute. This characterization seems even more realistic, as neither the plaintiff's right nor remedy would be barred under Connecticut law if we dismissed, Conn. Gen. Stat., Sec. 8337, and plaintiff could institute a new suit within one year of our dismissal. Conn,. Gen. Stat., Sec. 8332. A statute of limitations can be waived, *Matheny* v. *Porter*, C. C. A. 10, 158 F. 2d 478, 479, and we think defendant clearly has done so here. A contrary result would not only prolong the litigation but defeat the purpose of Rule 25 (a), as the closing of the estate of Birney Dysart would be interminably delayed. We are of the opinion that neither Rule 25 (a) nor the *Yungkau* case forces us to condone such a result.

The appellant's final claim of error is that the Special Master's computation of the "reasonable value" of the use of the invention was grossly excessive. The appellant first claims that the District Court and Special Master erred in refusing to consider and not give effect to proof that plaintiff, in 1934, granted a non-exclusive unrestricted license for the full life of the Dysart patent to Underwood-Elliott-Fisher for $100,000.00.

We want to note right here that the appellant originally claimed that this $100,000.00 figure paid by Underwood for a license was too high for use by the Special Master. On the contrary, its entire case—initially—was based on the claim that the "value of the use of the Dysart device" to it should be determined solely on defendant's showing of profits, or lack thereof.

It was only after the Special Master recommended an award well in excess of $100,000.00 that the defendant went into a tailspin—reversed itself—and petitioned to reopen the hearings to present evidence of other licenses granted by Mrs. Dysart.

The Special Master denied this motion on the ground that the $100,000.00 figure was a price fixed in settlement and was not a true mirror of worth. He also found that any other licenses granted could not represent dealings in the open market because of the cloud thrown on plaintiff's title by defendant's claim. These rulings were affirmed by Judge Smith, who also, on remand, directed the Master to take into consideration the effect competition resulting from these licenses might have on the value of the defendant's use.

In these rulings, there was no error. A contract made in settlement of litigation is inadmissible as evidence of value. *Activated Sludge, Inc. et al.* v. *Sanitary District of Chicago,* D. C., 64 F. Supp. 25, 33, Aff'd 157 F. 2d 517; cert. den. 330 U.S. 834; 67 S. Ct. 970; 91 L. Ed. 1281.

On February 19, 1931, an interference suit against the then pending Dysart patent was filed by a Mr. Sundstrand. This action was sponsored by Underwood-Elliott-Fisher, owner of the Sundstrand interests. It was decided in plaintiff's favor in 1934, and the license agreement between plaintiff and Underwood-Elliott-Fisher was part of the settlement of that litigation.[5]

Furthermore, such licenses as were granted, were granted when this litigation was an element which had to be taken into account. It could not help but make prospective licensees so cautious that such license fees would not be apt to reflect fair value.

Appellant claims that the District Court and Special Master erred in awarding plaintiff a greater sum than the reasonable value of the non-exclusive use of the Dysart device. But it is true that determination of damages involving misuse of a patent is a question of fact for the trier. *National Car-Brake Shoe Co.* v. *Terre Haute Car Co.* (C. C. Ind.), 19 F. 514. *Reynolds Spring Co.* v. *Young et al.,* C. C. A. 6, 101 F. 2d 257, 261. We cannot read the statement of the Special Master regarding royalty rates in

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[5]Transcript of Record, Page 134.

the same manner as the defendant does in its brief. We are satisfied that the District Judge properly resubmitted the matter to the Special Master with instructions to reconsider his findings to determine the reasonable value on the basis of actual experience for the entire period from 1924 to the close of the hearings "to make plaintiffs whole for the damages suffered by them from the breach of contract implied in fact to start paying within a reasonable time after the issuance of the patent, and to continue to pay, thereafter, the reasonable value of the use."

Thereafter, plaintiff introduced four witnesses who testified as to a reasonable royalty rate. They supplied ample basis for the findings as made. It should also be remarked that the defendant produced no witnesses on this point.

The defendant also claims that the Special Master and District Court erred in including the value of the Dreher mechanism, which, it claims, is entirely distinct and different from the Dysart device, in the calculation of damages for the use of the Dysart device in tabulating machines.

This claim is easily disposed of. The Special Master found that the Dysart device represented the important part of the machine—that which made it sell and which gave the machine its enhanced value.[6] This finding was approved by the Court. Indeed, the evidence overwhelmingly supports this finding, and this Court cannot say—in any way—that this finding was clearly erroneous. *Reynolds Spring Co.* v. *Young et al., supra.*

The last of the errors claimed by defendant is that allowance of interest from 1936 was erroneous. However, we believe the interest as allowed should be upheld. The defendant has made devious and strenuous efforts to avoid this claim. Judge Smith says that "it would be difficult to find a more adequate showing of exceptional circumstances justifying the award of interest than that for the unlawful detention of the amounts due to Dysart's successors." In

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[6]Transcript of Record, Page 169.

this we fully concur, and such interest is allowable in such circumstances—under Connecticut law. *Campbell* v. *Rockefeller,* 134 Conn. 585, 591-2. We find no error as claimed by defendant.

In this case, the plaintiff filed a cross-appeal claiming the Court erred in denying, in part, plaintiff's motion for costs.

The plaintiff objects to the disallowance of costs for expert services and witness fees for one person and one corporation. However, Judge Smith did not find that defendant's conduct during the hearings was dilatory or fraudulent.

The allowance of costs to the prevailing party is not a matter of absolute right; the Trial Court has inherent power to disallow a part, or all, of the costs in a case. *Prudence-Bonds Corp. et al.* v. *Prudence Realization Corp. et al.,* C. C. A. 2, 174 F. 2d 288.

There is no merit to the cross-appeal, and we do not disturb the action of the court below.

B.

RELEVANT PORTION OF DISTRICT COURT OPINION

IX. PARTIES.

Defendant has moved to dismiss the action in its entirety or alternatively insofar as it relates to Eva Perin Dysart either personally or as executrix of the estate of her deceased husband. The master's conclusion that this motion should be denied is the basis of a further objection to his report by defendant and of defendant's motion for summary judgment. It is contended that since Mrs. Dysart died December 30, 1945, and no one was substituted in the action to represent the interest of her estate or that of her husband pursuant to Rule 25(a)(1)[1], dismissal as to the deceased

[1]"If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party . . ."

party is mandatory. Plaintiffs' motion for leave to file a supplemental complaint addressed to the issues raised by the motion to dismiss was allowed by the Court and an answer was filed thereto. Subsequently both parties moved for summary judgment on these issues, supporting their motions with affidavits. The relevant facts appear as follows:

1. Birney Dysart died on July 20, 1932, leaving a will naming his widow, Eva Perin Dysart, as executrix and sole legatee. The will was admitted to probate by the Probate Court for the District of Hartford on August 22, 1932, and letters testamentary were issued to the said Eva Perin Dysart.

2. Isabel D. Bush, Samuel C. Dysart and Dorothy D. Fellers were the sole heirs-at-law of Birney Dysart and of Eva Perin Dysart.

3. Mrs. Dysart filed an inventory and a supplemental inventory purporting to list the assets of the estate but no reference was made to the claim against Remington Rand. The then pending application for patent, No. 565, on the negative total device was listed at an uncertain value.

4. An administration account was filed by Mrs. Dysart and approved by the Court of Probate on March 28, 1933. It was ordered on that date that the assets of the estate be distributed in accordance with the provisions of the will.

5. Distribution was so made pursuant to the order of the Court prior to August 8, 1933. Eva Perin Dysart as executrix had assigned to herself in her individual capacity all right, title and interest in and to several patents and patent applications, including Application No. 565.

6. Early in 1936, after the issuance of the patent, Mrs. Dysart, acting in her individual capacity, assigned to each of her three children an undivided 1/4th interest therein.

7. On October 25, 1937, a further inventory of the estate was filed by Mrs. Dysart, listing the claim against Remington Rand at an indeterminate value.

8. Mrs. Dysart died on December 30, 1945. In a petition to the Probate Court, Isabel D. Bush represented that the Estate of Birney Dysart was still unsettled and requested that she be appointed administratrix de bonis non with the will annexed, as successor to the deceased executrix.

9. Isabel D. Bush was so appointed by the Court of Probate on August 15, 1949, and on August 16 filed an inventory listing the claim against Remington Rand at an indeterminate value.

10. Mrs. Dysart left a will, naming Samuel C. Dysart, Isabel D. Bush and Dorothy D. Fellers as sole legatees. This will was admitted to probate on February 8, 1946 and Isabel D. Bush qualified as executrix.

11. An inventory and supplemental inventories were filed by Mrs. Bush as Mrs. Dysart's executrix in which the claim against Remington Rand was listed for death tax purposes at an appraised value of $100,000.00.

12. The Probate Court on February 18, 1947 approved the administration account filed by the executrix and ordered distribution of the assets of the estate of Mrs. Dysart.

13. The legatees entered an agreement for Mutual Distribution of the estate of Mrs. Dysart which was approved by the Probate Court on April 2, 1947. Distribution was made in accordance therewith to Isabel D. Bush, Samuel C. Dysart and Dorothy D. Fellers prior to June 17, 1947.

14. There was included in this distribution to each of the said legatees an undivided 1/12th interest in the Dysart patent No. 2014560 and an undivided 1/12th interest in the claim against Remington Rand.

15. All tax claims against the Estate of Eva Perin Dysart of the United States and the State of Connecticut have been fully settled and paid.

16. Isabel D. Bush has not been discharged by the Court of Probate either in her capacity as administratrix d. b. n. c. t. a. of the Estate of Birney Dysart or executrix of the Estate of Eva Perin Dysart.

17. The defendant had knowledge of the death of Mrs. Dysart in the early part of 1946.

Defendant contends that any claim arising out of the oral contract by the terms of which the Dalton Company undertook to compensate Dysart for the reasonable value of the use of the invention is personal to Birney Dysart and his estate; that the claim for compensation due from Remington Rand both prior to the death of Birney Dysart and subsequent thereto is an asset of his estate which has never been distributed; that the purported assignment by Mrs. Dysart of a 1/4th interest in the claim to each of the children was ineffective because Mrs. Dysart never had title to any part of the claim in her personal capacity; that the only person competent to assert the claim is the representative of the Estate of Birney Dysart; and that since more than two years have elapsed since the death of his executrix, no substitution having been made in the interim, dismissal of the entire cause of action should be directed.

Alternatively defendant argues that if the claim is not regarded as a personal one, and if the portion of the claim accruing after Birney Dysart's death is considered to have passed to Eva Perin Dysart and her assignees, nevertheless the action must be dismissed insofar as it asserts any claim on behalf of the estate of either Birney, or Eva Perin Dysart since plaintiffs have failed to procure substitution of the personal representative of either of them.

Plaintiffs, on the other hand, vigorously maintain that substitution of the personal representatives of Birney and

Eva Perin Dysart is not necessary since the estates of both have been full distributed to the children who are the only parties beneficially interested and all of whom are before the Court as parties plaintiff.

The master, after a careful consideration of the problem, reached the conclusion that the position of the defendant was not tenable. He decided that, since the Dysart children, the surviving plaintiffs, were the sole heirs of both Birney and Eva Perin Dysart, substitution of representatives of the two estates was not essential. Relying on Rule 25(a)(2),[2] he found that the "right sought to be enforced" herein was one which survived "only to the surviving plaintiff's" and, therefore, did not abate on the death of one of the plaintiffs. The master further suggested as reasons for denying the motion that defendant had waived its right or is estopped to rely on Rule 25 by failing to raise the question seasonably and that Rule 25 perhaps should not apply to an action such as this in which an interlocutory judgment has already been entered.

We cannot agree with the master on his main thesis that the action falls within the purview of 25(a)(2) and that substitution is, therefore, not required. That section of the Rule would appear to have been intended to apply only to situations where, after death, all interest in the cause of action survives to the living parties. Thus a suit by partners might properly proceed after the death of one of them without substitution of the deceased partner's representative, because of the survivorship interest of the living partners.[3]

---

[2]"In the event of death of one or more of the plaintiffs or one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties."

[3]*Jones* v. *Pettingill,* 245 Fed. 269 (1st Cir. 1917) decided under the former Sec. 779, Title 28 U. S. C., the precursor of the present Rule 25(a)(2). And see *Thomas* v. *Green County* (6th Cir. 1906) 146 Fed. 969 (suit by joint owners of bonds).

The Dysart children in this action did not receive an interest in the subject matter of the litigation by survivorship. Any interest that they take by virtue of the deaths of their parents comes to them through bequest or descent.

We cannot uphold defendant's contention that the claim under the implied contract was in its entirety personal to Birney Dysart and that the right to compensation accruing subsequent to Dysart's death did not pass under his will. In fact, Judge Clark specifically found otherwise: "All rights in the invention and the patent and all claims for use thereof after Dysart's death vested in her (Mrs. Dysart) as sole legatee under her husband's will and have been so distributed pursuant to appropriate probate decrees", 40 F. Supp. 596, 599. Nothing has been presented during the course of these proceedings, to incline the Court to alter its previous finding on this point. It follows that the assignment of the ¼th interest in the claim to each of the three Dysart children was an effective transfer.

The Mutual Distribution approved by the Court of Probate by its terms distributes equally to each of the children the portion of the claim to which Mrs. Dysart retained title under the 1936 assignment. The master's award is based on the assumption that the claim for compensation accruing during the interim between Dysart's death and 1936 was in its entirety in the estate of Mrs. Dysart since the assignment transferred an interest only in such payments as should accrue subsequent to its execution. No specific reference is made to that portion of the claim in the Mutual Distribution. But since all debts and tax liabilities of the estate have been settled and since the executrix has filed her return representing that all the property in her hands has been distributed to the persons entitled thereto, the interest in this portion of the claim has also passed to the surviving plaintiffs herein. It appears, therefore, that the children, by April, 1947, had acquired full legal title to that portion of the claim in the estate of their mother. Her executrix has no further interest in the subject matter of this consolidated

action, and it was unnecessary to make her a co-party plaintiff.

That portion of the claim against defendent which accrued prior to July 20, 1932 is an asset of the Estate of Birney Dysart and does not appear to have been distributed to his heirs. Plaintiffs contend that the probate decree of March 28, 1933, purporting to order the distribution of the "rest, residue and remainder" of the estate, effected distribution of the said claim, but neither the inventories nor the administration account makes reference to the claim. Moreover, the subsequent inventories filed in 1937 and 1949 list the claim as an asset still in the estate.

Since this portion of the claim still reposes in the estate, the proper party to an action to enforce it is the personal representative of the estate.[4] It is true that the surviving plaintiffs herein, as sole heirs of the decedent, have a vested beneficial interest in the chose in action, *Parlato* v. *McCarthy,* 136 Conn. 126 (1949). But the fact remains that until distribution is complete, legal title is with the personal representative. Nor is this a case where, as in *Bishop* v. *Groton Savings Bank,* 96 Conn. 325 (1921), the "technical title" of the representative can be disregarded, for it is admitted here that state and federal death taxes are still to be settled. Isabel D. Bush, as administratrix d. b. n. c. t. a. of her father's estate, should have been made a party to press that portion of the claim accruing between 1924 and 1932.

We would have felt constrained to grant defendant's motion to dismiss as respects the interest of the estate of Birney Dysart for failure of the plaintiffs to procure substitution[5] were it not for defendant's unreasonable delay

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[4]*Butler* v. *Sisson,* 49 Conn. 580 (1882); *West* v. *Howard,* 20 Conn. 581 (1850).

[5]See *Anderson* v. *Yungkau,* 329 U. S. 482 (1947) wherein the Court said in interpreting the Rule that "25(a) operates both as a statute of limitations upon revivor and as a mandate to the Court to dismiss an action not revived within the two-year period."

in raising the issue. Defendant had knowledge of Mrs. Dysart's death early in 1946; at any time subsequent to December 30, 1947, two years after the date of death, it could have moved for dismissal pursuant to Rule 25(a)(1). The claim for dismissal was not raised, however, until defendant filed its original brief with the master, at which time lengthy and costly hearings had already been held. These hearings had started in January, 1949. If defendant had raised its claim for dismissal at that time and the motion to dismiss had been granted, the accountings would have been greatly simplified (or possibly if defendant's motion had been granted in full, rendered unnecessary) for only the interests of the three plaintiff children would have been involved. Instead the proceedings went forward on the apparent assumption that the right of recovery of the Estates of Eva Perin and Birney Dysart was not questioned. Voluminous evidence which would have been irrelevant if the motion to dismiss had been seasonably pressed and granted, was introduced at great expense and effort to the plaintiffs. We agree with the master that by its acquiescence in allowing plaintiffs to put on full proofs, with no intimation that a claim for dismissal was going to be asserted, the defendant has procured a detrimental change in plaintiffs' position, has waived its right to have the action or any part of it dismissed under Rule 25 and is now estopped to seek dismissal.

Isabel D. Bush, administratrix d. b. n. c. t. a. of the Estate of Birney Dysart, may be admitted as a party plaintiff in the consolidated action.[6]

The interests of judicial economy also call for a denial of defendant's motion, for if the action were dismissed with respect to the estates, a new action could be instituted either

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[6]Under Rule 21 F. R. C. P. "(p)arties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." And cf. *Missouri, Kansas and Texas Railway Company* v. *Wulf*, 226 U. S. 570 (1913).

here or in the state courts by the personal representative pursuant to Section 8332 of the Connecticut Statutes (Revision of 1949).[7] The new action would present questions which may be more readily passed upon in this proceeding.

For the reasons stated, the defendant's motion for dismissal and summary judgment are denied. The plaintiffs' motion for summary judgment is granted to the extent indicated above. Findings 1 through 17 of Part IX hereof are adopted as additional Findings of Fact herein.

The recovery accruing to each of the plaintiff children shall be separately stated as such amount as is allowed to each of them for the 1/4th interest in the claim assigned to them by their mother, augmented by a 1/3rd interest in the amount allocated by the master to the Estate of Eva Perin Dysart. Isabel D. Bush, administratrix d.b.n.c.t.a., shall be entitled to recover such compensation as accrued prior to the date of the death of her testator.

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[7] "If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because of . . . or the action shall have been otherwise avoided or defeated by the death of a party; . . . his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 287

REMINGTON RAND, INC.,
Petitioner
v. (Defendant Below) Action No. 3978

ISABEL DYSART BUSH, DOROTHY DYSART FELLERS and SAMUEL CLAYTON DYSART,
Respondents
(Plaintiffs Below)

REMINGTON RAND, INC.,
Petitioner
v. (Defendant Below) Action No. 3979

ISABEL DYSART BUSH, Administratrix d.b.n., c.t.a. of the Estate of Birney Dysart, Deceased,
Respondent
(Plaintiff Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: September 28, 1954.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 213 F. (2d) 456. The pertinent provision of the opinion of the District Court, which was rendered July 10, 1951 (R. 790), is not reported. Both opinions are set out in the Appendix attached to the Petition (pp. 23-45).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

As to Action No. 3978

1. Where, as here, after the rendition of an interlocutory judgment determining the substantive rights of the parties under Connecticut law and establishing defendant's liability, one of four plaintiffs dies during the accounting proceedings, but within two years of her death—the time allowed for substitution under Rule 25(a)(1)—all her interest in and to the claim vested under State law in the three surviving plaintiffs, who then became the sole real parties in interest, does Rule 25(a)(1) require a dismissal?

As to Action No. 3979

2. Where, as here, after the rendition of such an interlocutory judgment the executrix-plaintiff of her husband's estate and sole legatee thereof died, but within two years of her death all her beneficial right, title and interest in and to the claim vested under State law

in the three surviving plaintiffs in the other action No. 3978 (consolidated with No. 3979), who then became the beneficial real parties in interest, and after the two-year period but prior to final judgment a personal representative of the husband's estate is added for the sole purpose of settling the estate's tax liability growing out of this litigation, does Rule 25(a)(1) require a dismissal?

As to both Actions No. 3978 and No. 3979

3. Under the circumstances stated above, does Rule 25(a)(1) divest the District Court of jurisdiction in either action when Rule 82 provides and this Court has repeatedly held that the federal "rules shall not be construed to extend or limit the jurisdiction of the United States district courts"?

4. Under the circumstances stated above and where Petitioner has waived or is estopped to claim error, if any, and makes no claim that it was prejudiced by the failure to make substitution, do not 28 U. S. C. § 2111 and related principles of harmless error preclude this Court from reversing either judgment that has been rendered on the merits?

5. Under the circumstances just stated, is this Court not precluded from reversing either judgment by 28 U. S. C. § 2105, which forbids a reversal for error in ruling upon matters in abatement that do not involve jurisdiction,

> where there was and is federal jurisdiction of the consolidated actions on the sole basis of diversity, and, if there is now a reversal of any of the present judgments, a new action or actions can be brought forthwith by the same surviving plaintiffs, now before the Court, against the same defendant in

the same District Court or in the State Court on the same claims that are presently in judgment?

6. Where jurisdiction is based solely on diversity, does Federal Rule 25(a)(1), regardless of other rules and statutes, regardless of the merits, and notwithstanding waiver and estoppel by defendant and lack of prejudice to the defendant, peremptorily require a dismissal of either or both actions, where such dismissal is not warranted by State law?

Statutes And Federal Rules Involved

Federal Rules *25(a)(1),* involving substitution upon death of a party, *21,* involving misjoinder and non-joinder of parties, and *6(b),* involving enlargement of time, are set forth in the Petition (pp. 3-4).

Other pertinent statutes and Federal Rules involved are:

Non-Jurisdictional Character Of Rules

Rule 82. Jurisdiction and Venue Unaffected.

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Transfer Of, And Real Parties In Interest

Rule 25. Substitution of parties.

(a) Death.

"(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action

does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties."

(c) Transfer of interest.

"In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) Real party in interest.

"Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

Harmless Error

28 U. S. C. § 2111. Harmless error.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 61. Harmless error.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment, or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 1. Scope of rules.

". . . They [the Federal Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."
(The complete text of Rule 1 is set out in the appendix.)

Abatement

28 U. S. C. § 2105. Scope of review; abatement.

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

Conn. Gen. Statutes § 8332 (Rev. 1949). Accidental failure of suit; when new action is allowable.

"If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because . . . the writ was abated . . . or the action shall have been otherwise avoided or defeated by the death of a party or for any matter of form; . . . the plaintiff, or, if the plaintiff be dead and the action by law survive, his

executor or administrator, may commence a new action for the same cause at any time *within one year after the determination of the original action or after the reversal of the judgment.* . . . The provisions of this section shall apply . . . to any action brought to the United States circuit or district court for the district of Connecticut . . ." (Emphasis supplied.) (The complete text of Section 8332 is set out in the appendix.)

Conn. Gen. Statutes § 8337 (Rev. 1949). Survival of actions and causes of actions.

"No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived; . . ." (The complete text of Section 8337 is set out in the appendix.)

Conn. Gen. Statutes § 8339 (Rev. 1949). Entry by successor of deceased executor or administrator.

"In any action by or against an executor or administrator, as such, in case of his death, his successor in office may enter and prosecute, or be cited in to defend it."

Conn. Gen. Statutes § 7041 (Rev. 1949). Removal, resignation or death of fiduciary, and appointment of successor.

". . . Upon the death, removal or acceptance of the resignation of any such person before the com-

pletion of his duties, such court of probate may appoint a suitable person to fill the vacancy caused thereby, who shall give a probate bond, and all suits in favor of or against any such person shall survive to and may be prosecuted by or against the person appointed to succeed him. . . ." (The complete text of Section 7041 is set out in the appendix.)

Conn. Gen. Statutes § 7056 (Rev. 1949). Court to ascertain heirs and distributees.

"The court of probate shall ascertain the heirs and distributees of each intestate estate, *and of each testate estate so far as the will may leave the same indefinite and necessary to be defined;* and such court shall order the administrator or other fiduciary charged with the administration of the estate to deliver possession of or pay over the same to the person or persons entitled thereto in the proportions provided by law, or, in case distributors are appointed or a mutual distribution is filed, as provided in section 7057, in accordance with the division made by such distributors or mutual distribution, taking proper receipts therefor." (Emphasis supplied.)

Statement

The two actions below, No. 3978 and No. 3979, were based on a contract to recover reasonable compensation for use by defendant, now Petitioner, Remington Rand, Inc., of an automatic credit balance device which was invented by Birney Dysart on or about December 25, 1919 and on which he applied for a patent.

Birney Dysart died July 20, 1932 before the issuance of a patent on said device, for the use of which the defendant has been adjudged liable. (R. 565, 1125) His heirs at law were his widow, Eva Perin Dysart, and their

three children, Isabel D. Bush, Dorothy D. Fellers and Samuel C. Dysart. Birney Dysart, however, died testate. His estate was probated in the Probate Court for the District of Hartford, Connecticut; his widow, Eva Perin Dysart, was appointed executrix; she was the sole legatee and distributee under the will. (R. 576, 661) The final administration account of Eva Perin Dysart as executrix was accepted by the Probate Court on March 28, 1933. (R. 576, 792) The Probate Court then found "that all claims duly presented within the time limited by the Court have either been paid, settled or barred by law". (R. 661) And thereafter, by decree of the Probate Court, all the estate of Birney Dysart was formally distributed, on August 8, 1933, to the sole legatee and distributee, Eva Perin Dysart. (R. 661, 662)

Letters patent under the Birney Dysart application, issued to Eva Perin Dysart, in her own right, on or about September 17, 1935. (R. 4093)

On or about July 25, 1936 she transferred to each of the three children, mentioned above, a one-quarter interest in and to the claim against Remington Rand, Inc., for the reasonable value of the use of the invention from the date of the transfer from Dysart's estate on August 8, 1933, together with a one-quarter interest in and to the patent. (Judge Clark's Finding 15, R. 104; opinion of District Judge Smith, R. 797, and Court of Appeals, Appendix to Petition, p. 32; 213 F. (2d) 456, at 463)

The potential tax liability of the Birney Dysart estate to the United States and to Connecticut, in the event of recovery against Remington Rand necessitated a division of the litigation on behalf of Eva Perin Dysart and her children into two parts. (R. 1162)

In 1937, two civil actions, No. 3978 and No. 3979, were instituted in the Superior Court of Connecticut against Remington Rand, Inc. (R. 10, 25) In No. 3978, the plain-

tiffs were Eva Perin Dysart, suing as an individual, and her three children, Isabel D. Bush, Dorothy D. Fellers and Samuel C. Dysart. Recovery was sought for breach of the contract to pay the reasonable value of the use of the invention from August 8, 1933, the time of the distribution of the estate of Birney Dysart. (R. 10) In No. 3979, the plaintiff was Eva Perin Dysart, suing as executrix of the estate of Birney Dysart. Recovery was sought for breach of the contract during the period prior to August 8, 1933. (R. 25)

These actions were removed by the defendant to the United States District Court for Connecticut on the sole basis of diversity of citizenship. (R. 22, 39)

After removal, the two actions were consolidated for trial because of common questions of law and fact. (R. 95)

On July 18, 1941, Circuit Judge Clark, sitting as district judge, rendered an interlocutory judgment establishing liability of the defendant in favor of the plaintiffs in No. 3978 and the plaintiff in No. 3979, and ordering the defendant to account. (R. 113) He adjudged that the Birney Dysart estate (action No. 3979) "is entitled to all sums accruing to Dysart before his death" (R. 104); and the plaintiffs in No. 3978 are entitled to all sums subsequently accruing in equal shares. (R. 104; 40 F. Supp. 599)

The consolidated case was referred to a master on October 2, 1941. Preliminary hearings, largely of a procedural nature for the assembly of necessary data and evidence, were held before the master on October 24, 1941; July 13, 1942; July 9, 1943; June 2, 1944; December 10, 1945; and February 14, 1946. (R. 122) Respondents (plaintiffs) never consented to delay because of World War II, as stated in the defendant's Petition (p. 5).

Eva Perin Dysart died December 30, 1945, approxi-

mately 4-1/2 years after the interlocutory judgment, *supra;* and about three years before the beginning of the hearings on the merits before the master, subsequently referred to. (R. 565)

The defendant had knowledge of Mrs. Dysart's death in the early part of 1946, shortly after the death occurred. (District Court Finding 17, R. 794; Court of Appeals opinion, Appendix to Petition, p. 33; 213 F. (2d) 463-464)

The estate of Eva Perin Dysart was fully settled and distributed to her three children above named, the remaining plaintiffs in this consolidated action, by Certificate of Mutual Distribution filed and accepted on March 27, 1947, by the Probate Court; and the tax liability to the United States and to the State of Connecticut was fully settled and paid. (R. 793, 794; Appendix to Petition, p. 32)

All of this occurred within two years—the time required for substitution under Rule 25(a)(1)—of the death of Eva Perin Dysart. (R. 608, 720)

Hearings on the merits before the Master with full production of evidence commenced on January 11, 1949, and continued on January 12, 13, 1949. On the fourth hearing day, January 19, 1949, the death of Eva Perin Dysart was suggested on the record. (R. 2174) Hearings thereafter continued and were had on April 12, 13, 14, 19, 20 and 21, May 17, 18, 19, 24, 25, 26 and 27, and June 8, 9, 10, 14, 15, 16 and 17, 1949. (R. 123)

Thereafter, on July 25, 1949, in its original brief, the defendant first raised the objection that no substitution had been made for Eva Perin Dysart, who had died December 30, 1945, approximately three and one-half years previously. (R. 124, 200) The Master overruled the objection. (R. 211)

The Probate Court appointed Isabel D. Bush admin-

istratrix d. b. n., c. t. a. of the estate of Birney Dysart on August 16, 1949. (R. 666) The Birney Dysart estate having been previously distributed and all claims having been discharged, other than the tax claims growing out of action No. 3979 (*supra*, p. 9), this appointment was for the sole purpose of liquidating the potential tax liability of the estate of Birney Dysart to the United States and to the State of Connecticut. (R. 594, 1162)

On January 31, 1950, defendant moved under Federal Rule 25 to dismiss the individual claim of Eva Perin Dysart in action No. 3978 and her claim as executrix in action No. 3979, on the ground that substitution had not been made within two years of her death. (R. 274) Defendant did not ask the Court to dismiss the claims of the three plaintiff children in action No. 3978. (R. 274)

Not until June 11, 1951 did defendant move for a dismissal of action No. 3978, in its entirety, i.e., the individual claims of the plaintiff children as well as the individual claim of Eva Perin Dysart. It also then moved for dismissal of action No. 3979.

Defendant never raised any objection that the three plaintiff children and Eva Perin Dysart, as an individual, were not the real parties in interest in action No. 3978, either in its pleadings (R. 66-72) or during the trial on the merits as to liability before Judge Clark in 1941, or during the long accounting proceedings before the Master. This objection was made for the first time in its motion of June 11, 1951—almost 14 years after the institution of the actions—and represents a complete reversal of its position unequivocally taken in June, 1941. At that time, defendant argued that the claim in litigation had been fully distributed out of the estate of Birney Dysart; that Eva Perin Dysart as his executrix had no right to maintain action No. 3979; and that the entire claim was in Eva Perin Dysart and her three plaintiff children in

action No. 3978. (Brief of defendant to District Court, June 23, 1941, p. 75*) (See p. 24 *infra*)

Petitioner's argument under its Point IV (Petition, pp. 18-22) is in support of the objection first made as noted above in its motion of June 11, 1951, and in repudiation of its opposite position maintained throughout the preceding 14 years.

On July 12, 1951, Judge Smith denied defendant's motion; and granted plaintiffs' motion to add Isabel D. Bush, administratrix d. b. n., c. t. a. of the estate of Birney Dysart, as a party plaintiff. (R. 800, 802)

On July 22, 1952, Judge Smith rendered final judgments against the defendant and in favor of the respective plaintiffs in the following amounts (R. 1125; Appendix to Petition, p. 26):

Action No. 3978

Isabel D. Bush .....$359,094.56; execution to issue
Dorothy D. Fellers .... $359,094.56; execution to issue
Samuel C. Dysart ..... $359,094.56; execution to issue

Action No. 3979

Isabel D. Bush, as
administratrix d.b.n.
c.t.a. of the estate
of Birney Dysart ..... $142,717.91; execution to issue

On May 25, 1954, the Court of Appeals for the Second Circuit unanimously affirmed the above judgments of the District Court. (Appendix to Petition, pp. 23-37)

*By stipulation of counsel filed in the Court of Appeals, dated October 15, 1953, excerpt quotes may be made from the briefs of the parties filed in the District Court, without certification of the briefs.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There is no substantial jurisdictional question for review. The applicability of Rule 25(a)(1) does not involve jurisdiction in light of the clear provisions of Rule 82 and the decisions of this Court that Federal Rules do not affect jurisdiction.

Petitioner makes no contention that the merits, which involve only State substantive rights, have been improperly adjudged. It presents only a question of federal procedure involving substitution; and makes no contention that failure to substitute prejudiced it. Error, if any, was harmless; and did not involve jurisdiction. If any of the actions are now abated, a new action can be forthwith brought, and under Connecticut law the defendant cannot successfully plead the statute of limitations. Petitioner can gain only delay.

Since reversal by this Court of these judgments is barred by 28 U. S. C. § 2111 and § 2105, on harmless error and abatement, the grant of certiorari would serve no useful purpose.

Further, there is no question for review in action No. 3978. Substitution was unnecessary, for within two years of the death of one of the four plaintiffs, all her interest vested in the three remaining plaintiffs.

And there is no substantial question for review in action No. 3979. Both of the lower Courts have found waiver and estoppel because of defendant's delay, to plaintiffs' prejudice, in raising the technical objection of non-substitution.

Moreover, within two years after the death of the executrix, all beneficial interest vested and all parties entitled to share in the recovery were and are before the Court. Petitioner has no valid interest as to how the proceeds of a recovery against it shall be divided.

The decisions below correctly applied the Federal Rules to the facts of this case; and they are not in conflict with the decisions of this Court.

Because of its facts, action No. 3979 is not a proper vehicle for general exposition by this Court of the scope and validity of Rule 25(a)(1) for the guidance of the Federal Bar and the governance of the Federal Courts. Furthermore, the proposed amendment to Rule 25(a)(1), discussed on page 10 of the Petition, may render any present construction of Rule 25(a)(1) of short-lived duration.

After 17 years of litigation, judgments on the merits in both actions have been affirmed by the Second Circuit. The Circuit stated:

> "The defendant has made devious and strenuous efforts to avoid this claim."*

Its Petition for Certiorari is another such effort.

There is no special and important reason, within the intendment of this Court's Rule 19 (1), to warrant the grant of certiorari; and this Court, in the exercise of a sound judicial discretion, should deny certiorari in both action No. 3978 and No. 3979.

SUMMARY OF ARGUMENT

I

Action No. 3978

There is no question for review in action No. 3978.

Eva Perin Dysart and her three children were the original parties plaintiff in this action for damages accruing after the distribution of the Birney Dysart estate.

*Appendix to Petition, bottom p. 36.

Eva Perin Dysart's estate having been fully distributed within the time allowed for substitution, all her interest, both legal and equitable, vested in the three surviving plaintiff children. Both lower courts have found that substitution thereupon became unnecessary.

Petitioner raises no substantial question as to the applicability of Rule 25(a)(1) in action No. 3978.

Petitioner now asserts that the four original plaintiffs had no interest under Connecticut law in the claim in action No. 3978 when that action was instituted; that both of the lower courts erred in holding Connecticut law to be otherwise; and that a dismissal of No. 3978 must follow a dismissal of action No. 3979.

This theory is a very belated afterthought, first advanced on June 11, 1951, and is diametrically opposed to Petitioner's position taken ten years before in 1941, to the effect that the plaintiffs in No. 3978 were possessed of the only enforceable claim. And it is also inconsistent with the position taken as late as January, 1950, when, in reference to No. 3978, it sought dismissal only as to the claim of Eva Perin Dysart.

Petitioner's belated theory is frivolous and without merit. The original plaintiffs in No. 3978 were the real parties in interest under Rule 17(a) and Connecticut law. Judge Clark and Judge Smith, both trained in Connecticut law, so found; and the Second Circuit affirmed. This Court will not grant certiorari to review such concurrent findings of the lower courts.

Further, the grant of certiorari would not settle an important question of Federal law, i.e., the meaning and application and reconciliation of Federal Rules 25(a)(1), 21 and 6(b), for which Petitioner seeks certiorari in its "Questions Presented" and in its "Reasons for Granting the Writ". (Petition pp. 2-3, 7-8)

II

Action No. 3979

There is no substantial question for review in action No. 3979.

Eva Perin Dysart, as executrix of the estate of Birney Dysart, was the original plaintiff in this action to recover damages accruing prior to the distribution of the Birney Dysart estate.

She subsequently died and within the time allowed for substitution, her estate was fully distributed, as stated above. Since she was the sole legatee and distributee of the Birney Dysart estate, the plaintiff children in No. 3978 became the beneficial real parties in interest in No. 3979. And since they were before the Court in the consolidated case, it was only necessary to add a party to represent the bare legal title for the purpose of settling the tax liability growing out of the litigation of action No. 3979. This was done by adding one of the children as administratrix d.b.n., c.t.a. in No. 3979.

This action was thoroughly consistent with *Anderson v. Yungkau* (1947) 329 U. S. 482, which involved the enforcement of a federal right and held that plaintiff's failure to revive the suit *against* the executor of the deceased defendant within the two-year period of Rule 25(a)(1) necessitated the dismissal of the action. The rule period was in the nature of a statute of limitations and operated for the protection and repose of the estate.

In the diversity case at bar, Rule 25(a)(1) is being invoked by the Petitioner against the estate despite waiver and estoppel, and to destroy the rights of plaintiff estate under the substantive law of Connecticut, in violation of both the Rule-Making Statute (28 U. S. C. § 2072) and the principles of *Erie-Tompkins*. And to what avail? In-

terminable delay in the closing of the estate. Defendant gains nothing else. Under Connecticut law, a new action on behalf of the estate could be brought forthwith against the defendant; and the statute of limitations would not apply.

Judicial economy forbids such repetitious folly.

III

Action No. 3978 and Action No. 3979

No jurisdictional question warrants review in either action No. 3978 or No. 3979.

In *Anderson v. Yungkau,* this Court stated that "Rule 25(a)(1) operates both as a statute of limitations upon revivor and as a mandate to the Court to dismiss an action not revived within a two-year period."

Relying upon *Anderson v. Yungkau,* Petitioner asks this Court to construe Rule 25(a)(1) as jurisdictional. This construction is inadmissible:

> Federal Rule 82 states that "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .".
>
> Decisions of this Court are in accord with that principle.
>
> *Yungkau* did not give any jurisdictional effect to Rule 25(a)(1). It construed the rule as a statute of limitations not subject to enlargement by the District Court.

IV

Action No. 3978 and Action No. 3979

Error, if any, of the District Court in refusing to dismiss action No. 3978 or action No. 3979 for failure to

substitute a party in lieu of Eva Perin Dysart is harmless. All the parties having an interest in the recovery are before the Court, and *Petitioner makes no claim of prejudice.*

Since this Court, if it grants certiorari, is required by 28 U. S. C. § 2111 and related principles to disregard harmless error, a review in neither case will serve a useful purpose.

The District Court's refusal to dismiss either action is not reversible for an additional reason. Its ruling involves matter in abatement of a non-jurisdictional character and 28 U. S. C. § 2105 forbids reversal both by the Court of Appeals and by the Supreme Court.

On next November 12, 1954, these cases will have been in litigation for 17 years. At long last, judgments on the merits in the two actions, No. 3978 and No. 3979, have been rendered by the District Court and affirmed by the Second Circuit.

Petitioner makes no claim of error as to the merits, nor any claim of prejudice. It has had not only its day in court but has had almost a generation. That should suffice.

ARGUMENT

POINT I

Action No. 3978

THE ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS IN REFUSING TO DISMISS NO. 3978 IS THOROUGHLY CONSISTENT WITH *ANDERSON v. YUNGKAU.*

A. Substitution was not required by Rule 25(a) (1) nor by *Anderson v. Yungkau* where, *within* two years of the death of one of four plaintiffs, all her interest vested in the three surviving plaintiffs, who then became the sole real parties in interest.

Anderson v. Yungkau dealt with an entirely dissimilar state of facts. It held that an action could not be revived against the estate of a deceased defendant *more* than two years after the death of the defendant. It says nothing, however, as to any requirement of substitution under Rule 25(a)(1), where, as here, the interest of a deceased plaintiff passed *within* two years to the surviving plaintiffs who became the only parties in interest. (See discussion Point II, *infra.*)

Eva Perin Dysart died December 30, 1945. Within the period allowed for substitution, her estate was fully distributed to the three surviving plaintiff children on March 27, 1947. Thereupon, as both the District Court and the Court of Appeals found, the children, already parties plaintiff in action No. 3978, acquired full legal title to the estate of their mother, and both courts found substitution unnecessary. Indeed, after March 27, 1947, it would have been impossible to substitute a party in No. 3978 in lieu of Eva Perin Dysart, because her estate no longer had any interest in the litigation.

Petitioner nowhere questions the above conclusions.

B. The question raised in Petitioner's Point IV—that the *original* plaintiffs did not have an enforceable claim when suit was instituted—is not pertinent to a construction of Rule 25(a) (1) and hence is not properly before this Court.

Petitioner seeks to circumvent the conclusions in Point I A *supra,* by contending that the four original plaintiffs in action No. 3978, Eva Perin Dysart and her three chil-

dren, do not have an enforceable claim; that the only enforceable claim is in the Birney Dysart estate in action No. 3979; and that if No. 3979 is dismissed for failure to make substitution pursuant to Rule 25(a)(1), then a dismissal of No. 3978 must follow.

The question raised in Point IV is not properly before this Court. It is not included in Petitioner's "Questions Presented", which concern solely the applicability of Rule 25(a)(1) and its relationship to Rule 21 on addition of parties and Rule 6(b) on enlargement of time. (Petition, pp. 2-3) Nor is it included in its general reason for granting the writ (pp. 7-8), where Petitioner states:

> "This case presents an important question of federal law, i.e., the meaning and applicability and reconciliation of three Federal Rules of Civil Procedure [Rule 25 (a)(1), Rule 21 and Rule 6(b)] promulgated for the guidance of the federal bar and the governance of the federal courts."

But there is no problem in No. 3978 of adding parties under Rule 21 or enlarging the time period of Rule 25(a)(1) by resort to Rule 6(b). And Petitioner's Point IV is predicated on the unrelated proposition that the lower courts "decided an important state question", to wit, whether plaintiffs in No. 3978 have an enforceable claim "in a way in conflict with applicable state law" (Petition, p. 18).

Judge Clark and Judge Smith, both trained in Connecticut law, found that there had been an effective transfer of the claim to the original plaintiffs in No. 3978 prior to the institution of that action; and that the original plaintiffs were the real parties in interest to sue upon that claim. The Second Circuit affirmed. (See C (1) *infra*)

The grant of certiorari to review such concurrent findings of the lower courts would not serve a useful purpose

since, under the established rule, this Court normally accepts concurrent findings of federal courts, except where constitutional or other important public questions hinge upon factual determinations. See 5 Moore's Federal Practice (2d ed.) par. 52.12. There are no such questions in this case, which involves *only* the enforcement of state substantive rights.

As this Court stated in *Graver Tank & Mfg. Co. v. Linde Air Products Co.* (1949) 336 U.S. 271, 275:

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

C. Petitioner's Point IV lacks merit.

(1) *Both lower courts have found that the plaintiffs in No. 3978 have an enforceable claim.*

Judge Charles E. Clark, sitting as a district judge so found, 40 F. Supp. 596, 599.

District Judge Smith reaffirmed that position. He stated:

> "We cannot uphold defendant's contention that the claim under the implied contract was in its entirety personal to Birney Dysart and that the right to compensation accruing subsequent to Dysart's death did not pass under his will. In fact, Judge Clark specifically found otherwise: 'All rights in the invention and the patent and all claims for use thereof after Dysart's death vested in her (Mrs. Dysart) as sole legatee under her husband's will and have been so distributed pursuant to appropriate probate decrees', 40 F. Supp. 596, 599. Nothing has been presented during the course of these proceedings, to incline the Court to alter its previous finding on this point. It follows that the assignment of the ¼th interest in the claim to each

of the three Dysart children was an effective transfer."

The Second Circuit affirmed that finding, pointing out that Eva Perin Dysart was sole legatee and that "in 1935* she had transferred a three-quarter interest in equal parts to her three children who were also plaintiffs in the second action". (Appendix to Petition, p. 32)

Petitioner's argument that there can be no distribution of non-inventoried assets under Connecticut law, and hence that the original plaintiffs in No. 3978 have no enforceable claim, was rejected by both the District Court and the Court of Appeals. The position of the lower courts is sustained by the following Connecticut cases determining Connecticut probate law:— *Parlato v. McCarthy,* 136 Conn. 126 (1949); *Lynch v. Skelly,* 138 Conn. 376 (1951); *Woodhouse v. Phelps,* 51 Conn. 521 (1884); *Bishop v. Groton Savings Bank,* 96 Conn. 325 (1921); 2 Locke & Kohn, Conn. Probate Practice, Sec. 596, pp. 738-739.

Bankers Trust Co. v. Greims, 110 Conn. 36 (1929), the sole Connecticut case upon which Petitioner relies in support of its proposition is readily distinguishable. That case dealt with distributors appointed by the probate court in an *intestate* estate and the court there held that the duties of such distributors were statutory and ministerial; and that they were without authority to distribute any property of the estate which had not come into their hands or had not been inventoried, where such property consisted of *realty* situated outside of Connecticut. That case has no application to a *testate* estate, as in the instant case, where all the rest, residue and remainder consisting solely

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*Sic; should be 1936, p. 9, *supra.* The difference in date, 1935 or 1936, is, however, unimportant, since in either event the transfer occurred prior to the institution of action No. 3978 on November 17, 1937 (R 14).

of *personalty* is left to the surviving widow as the sole legatee. In this situation, there is no need for the appointment of distributors and the beneficial title to all personalty vests in the heirs upon the death of the decedent. The Connecticut statute so provides, and the cases cited above so hold. (See Sec. 7056, Conn. General Statutes (Rev. 1949); *Cole v. Jerman,* 77 Conn. 374 (1904); *State ex rel. Lynch v. Whitehouse,* 75 Conn. 410 (1903); 2 Locke & Kohn, Conn. Probate Practice, Secs. 598, 599, pp. 742-7.)

Even assuming arguendo that both the lower courts erred, the error is not of such an exceptional character as to warrant review by this Court (see Point I B, *supra,* p. 20); and especially where it is not pertinent to a construction of Rule 25(a)(1).

(2) *Petitioner's present position is the exact reverse of the position it maintained from the institution of the suit in 1937 down to June 11, 1951.*

Defendant (Petitioner) in its pleadings never objected that the claim in action No. 3978 was not vested in the three plaintiff children and Eva Perin Dysart, as an individual, as the real parties in interest. On the contrary, following the trial before Judge Clark as to the substantive rights of the parties, defendant in its brief on June 23, 1941 asserted that Eva Perin Dysart, as executrix, did not have an enforceable claim in No. 3979 and that the only enforceable claim was vested in the plaintiffs in No. 3978. Counsel stated in its brief*:

> "An examination of the record (pages 22-25) shows that Mrs. Dysart as Executrix transferred to herself and the other heirs all right, etc., which she as Executrix had in various patents including

*See footnote, p. 13, *supra.*

the one in question. As soon as she had done this (even if there were other items in the estate which were not yet distributed) *she lost the right to sue as this passed to the distributees.*

"It will be noted that both suits are identical excepting only the portions relating to the description of the plaintiffs. If the Executrix had not given all her right and title in the patent to the distributees they could not sue. But they have sued relying on the title they got from her and certainly the law does not permit the same estate to sue for the same thing twice—*once by the Executrix (particularly after she had transferred all her interest in the res) and once by the distributees.*

"We respectfully claim that our motion to dismiss the suit of the executrix should be granted." (Emphasis supplied)

Subsequently and during the long accounting proceedings before the Master, defendant did not change that position.

In its August 24, 1949 brief* (p. 48) to the Special Master after the accounting had been concluded when defendant raised the question of lack of substitution and objected to the claim of Eva Perin Dysart, as executrix, in No. 3979, and to the claim of Eva Perin Dysart, as an individual, in No. 3978, it expressly stated:

> "We contend that the action must be dismissed except for the one-fourth interest of each of the three existing co-plaintiffs, from 1936 to date."

And it adhered to that position as late as January 31, 1950 when it moved (R. 274) to dismiss, for non-substitution, the claim of Eva Perin Dysart, as executrix (action No. 3979) and the claim of Eva Perin Dysart, as an individual, in action No. 3978. *Defendant did not ask the*

*See footnote, p. 13, *supra.*

Court to dismiss the claims of the three plaintiff children in No. 3978.

It was not until June 11, 1951 (R. 620)—almost 14 years after the institution of No. 3978—that defendant completely reversed its position and adopted the present position which it now asserts in Point IV.

Settled law does not permit a party to reverse his position during litigation to the prejudice of the opposing party.

(3) *Petitioner's objection is frivolous and not timely.*

It is clear that Petitioner's present position set forth in its Point IV results from a belated afterthought and is frivolous.

> "Objections to parties are generally matters of a dilatory nature in abatement of the action and must be seasonably made having regard to the nature of the action . . .; to the alleged defect, whether a want of capacity or interest, a nonjoinder or misjoinder of parties . . . and unless so made are ordinarily to be deemed waived."
>
> 39 Am. Jur. Parties Sec. 104, p. 975; *McCandless v. Furlaud* (1934) 293 U. S. 67; *Merwin v. Richardson,* 52 Conn. 223 (1884)

(4) *Petitioner has no valid interest or concern as to how the proceeds of a recovery against it shall be divided.*

By the distribution of Birney Dysart's estate, and the subsequent assignment by Eva Perin Dysart of a ¼th interest to each of the three children in and to the contract claim and the patent, as well, individual interests in and to the chose in action on the contract were created. (Point I C (1), *supra*)

Under Connecticut law, by virtue of the wills of Bir-

ney Dysart and Eva Perin Dysart and the distribution of their estates, all interest, both legal and equitable, in action No. 3978 vested in the three surviving plaintiff children. (Point I A, and C (1), *supra,* pp. 20, 22.)

And for the same reasons all beneficial interest in action No. 3979 vested in those same plaintiff children; and the administratrix d.b.n., c.t.a. in No. 3979 has only a bare legal title to take the recoverable proceeds in this action, liquidate the estate's tax liability growing out of this litigation, and then pay over the residue to the plaintiff children. (Point II C, *infra,* p. 37.)

Petitioner makes no contention that there is any error as to the amounts of the judgments in actions No. 3978 and No. 3979.

To paraphrase this Court in *Greene County v. Thomas, Ex'r.,* 211 U. S. 598, 602 (1909), the defendant in the case at bar owes the amount adjudged as the reasonable compensation for the contractual use of Birney Dysart's invention. It has no interest or concern in the proper division of the amounts adjudged to be due and owing by the defendant.

POINT II

Action No. 3979

THE ACTION OF THE DISTRICT COURT AND THE COURT OF APPEALS IN REFUSING TO DISMISS NO. 3979 IS THOROUGHLY CONSISTENT WITH *ANDERSON v. YUNGKAU.*

Action No. 3979 is the suit by Eva Perin Dysart, as executrix of the estate of Birney Dysart, to recover damages up to the date of distribution of Birney Dysart's estate; i.e., for the period prior to that covered in action No. 3978.

Although all claims of creditors had been paid and the

estate of Birney Dysart distributed to Eva Perin Dysart in 1933 as sole legatee, the potential tax liability of the estate to the United States and the State of Connecticut had not been liquidated and this necessitated a division of the litigation into two actions, No. 3978, *supra,* and No. 3979, under discussion.

During the lifetime of Eva Perin Dysart, an interlocutory judgment was rendered in 1941 determining the substantive rights of the parties and establishing the liability of the defendant in favor of her as plaintiff-executrix. This disposed of all questions except the amount due.

After Eva Perin Dysart's death and *within* two years thereof, her estate was distributed (March 27, 1947). At that time her three children, co-plaintiffs in No. 3978, who became the sole real parties in interest of both the legal and equitable title to the claim in No. 3978, also then became the sole real parties in interest of the beneficial title to the claim in No. 3979. The plaintiff children were at that time, to wit, March 27, 1947, before the Court in the consolidated case as they had been from the institution of the litigation.

Since the proceeds of any judgment to be rendered in No. 3979, after liquidating the tax liability to the United States and to Connecticut, must be paid over to the plaintiff children, it was necessary only to add a party to accomplish this purpose. This was done when Isabel D. Bush, one of the plaintiff children, was added as administratrix d.b.n., c.t.a. in No. 3979.

Although defendant could have objected to the failure to substitute for Eva Perin Dysart, executrix, immediately after December 30, 1947, defendant delayed in making its technical objection of non-substitution until after the conclusion of the long and costly accounting proceedings, to the prejudice of plaintiffs.

A. Rule 25(a) (1) is not jurisdictional; as construed in *Yungkau*, a case involving a federal matter, it operates as a statute of limitations for the protection of an estate.

Yungkau did not construe Rule 25(a)(1) as jurisdictional; and sound principles forbid such a construction. (See Point III, *infra*, p. 44.)

Yungkau construed the rule as operating "as a statute of limitations" and "as a mandate to the Court to dismiss" for the protection and repose of an estate. Petitioner, however, would have this Court apply *Yungkau* to defeat the plaintiff estate and interminably delay its settlement.

As the Court noted, *Yungkau* involved a *federal* matter (see its footnote 4, 329 U.S. 482, at p. 485); and a reconciliation of Rule 25(a) and Rule 6(b) (329 U.S. at p. 484). The case did not involve a reconciliation of Rule 21 on the addition of parties with Rules 25(a) and 6(b).

It involved a suit by a receiver of a national bank to recover stock assessments. The Court affirmed the dismissal of the action by the lower courts because of plaintiff's failure to revive the suit against the executor of a deceased defendant within two years of the latter's death.

In *Yungkau*, this Court stated in reference to 28 U.S.C. § 778 (1940), upon which Rule 25(a) is partially based:

> *"That statute, like other statutes of limitations, was a statute of repose.* It was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed. That policy is reflected in Rule 25(a). . . .
>
> "Thus, as stated by the Circuit Court of Appeals, Rule 25(a) operates *both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period.* . . .

> "Reasons of policy support this construction [that the time period of Rule 25(a) is not subject to enlargement by Rule 6(b)] . . . For the normal policy of a statute of limitations is to close the door —finally, not qualifiedly or conditionally. *The federal law embodied in Rule 25(a) has a direct impact on the probate of estates in the state courts. It should not be construed to be more disruptive of prompt and orderly probate administration in those courts than its language makes necessary.*"
>
> 329 U.S. 482, 485, 486 (Emphasis supplied)

Nothing that the Court said above involves jurisdiction. (See Point III B, *infra,* p. 45.)

All that the Court said was for the protection of the estate of the deceased defendant. This Court says, in effect, that the court below cannot waive the defendant's statute of limitations so as to delay settlement of the estate. None of these factors appear in the case at bar.

Nowhere does this Court say that the defendant cannot waive the statute of limitations or by its conduct be estopped from asserting it—as both lower courts found defendant did in the case at bar.

The estate of Birney Dysart is open for the purpose of adjusting the tax liabilities of this estate growing out of the pending litigation. To dismiss the claim involved and thereby force the administratrix d.b.n., c.t.a. to institute a new action against the defendant, would only delay settlement of the estate and both lower courts so found.

Plaintiff in *Yungkau* sought to continue his action against decedent by a revivor against the decedent's executor. He did not attempt to add the executor as a party defendant under Rule 21, and state a cause of action against him as executor. The statute of limitations governing the presentation of claims and suits *against* an executor would bar such a cause of action. In the present case,

however, the plaintiff-executrix was enforcing a claim on behalf of the Birney Dysart estate against Remington Rand. Under Connecticut law, this claim of the estate survived the death of the executrix and there is no time limit provided for the entry of a representative of the Birney Dysart estate, and hence Isabel D. Bush, administratrix d.b.n., c.t.a., could be added as a party plaintiff at any time before final judgment. (See p. 32, *infra*.)

Petitioner completely fails to distinguish between these two situations; one, an action *against* an estate and, the other, an action brought on behalf of an estate.

In *Yungkau* the executor, by invoking Rule 25(a)(1) and former 28 U.S.C. §778 (1940), rid himself for all time of the claim of the national bank receiver. Not only did the action abate but plaintiff's cause of action abated also. This is not so in the case at bar. As both lower courts have held, if action No. 3979 is dismissed, Isabel D. Bush, as administratrix d.b.n., c.t.a. of the estate of Birney Dysart, may forthwith institute a new action, either in the U. S. District Court or in the State Court, and under Connecticut law the action will be timely.

If the new action were brought in the District Court, the plaintiff could forthwith move for Summary Judgment pursuant to Rule 56(a) and this motion would be granted because of the absence of any genuine issue of material fact, relative to liability and the amount of damages in the light of the adjudications by both the District Court and Court of Appeals in this action. 6 Moore, pp. 2028, 2043, 2061.

Sec. 8332 (Conn. General Statutes—Rev. 1949) provides:

> "If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because of . . . or the action shall have been otherwise avoided or defeated by

> the death of a party; . . . his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment . . ."

Sec. 8332 is remedial and subject to a liberal interpretation. *Johnston v. Sikes,* 56 Conn. 589 (1888); *Baker v. Baningoso,* 134 Conn. 382, 387 (1948).

Sections 7041 and 8339 (Conn. General Statutes—Rev. 1949) both provide that in case of the death of an executor or administrator, his successor in office may enter to prosecute or defend any pending action. No time limit is prescribed for the entry.

In the case at bar, the Courts did not exercise any discretion under Rule 6(b) to enlarge the time for substitution under Rule 25(a) (1). They did not violate the mandate of dismissal. Both lower Courts recognized that principle of *Yungkau.* They held, however, that the defendant by its prejudicial action could waive and had waived or was estopped to assert the time period of Rule 25(a) (1) which operates as "a statute of limitations." (See Point II B, *infra,* p. 36.)

The rendition of the interlocutory judgment prior to the death of Eva Perin Dysart and the full distribution of her estate *within* two years of her death, the presence of all the beneficial real parties in interest in the consolidated case, the delay of the defendant in raising the objection to the plaintiffs' prejudice and other related facts, clearly distinguish the case at bar from all of the lower court cases dealing with Rule 25 (a) (1), cited by Petitioner on page 11 of its petition.

The only other cases relied upon by Petitioner are two decisions of this Court dealing with an entirely different problem, to wit, the substitution of a federal official—

Snyder v. Buck (1950) 340 U. S. 15 and *United States ex rel Claussen v. Curran* (1927) 276 U. S. 590.

Both deal with Section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941, substantially carried forward as Rule 25(d).

Snyder v. Buck was a mandamus action against a federal official, a naval paymaster, to compel him to pay the plaintiff-widow's allowance. After judgment in plaintiff's favor, the defendant ceased to be a paymaster and no substitution of his successor in office having been made within six months, as then required by both statute and Rule 25(d), the Court held that plaintiff's judgment must be vacated and she must start over.

In the *Snyder* case, the Court stated (340 U.S. at p. 18):

> "The complaint in this case makes no claim against [the naval paymaster] Buck personally . . . The writ that issued against Buck related to a duty attaching to the office. The duty existed so long and only so long as the office was held. When Buck retired from office, his power to perform ceased. He no longer had any authority over death gratuity allowances. Moreover, his successor might on demand recognize the claim asserted and discharge his duty. For these reasons it was held that in the absence of a statute an action aimed at compelling an official to discharge his official duties abated where the official died or retired from the office."

After pointing out that the Act of February 8, 1899 had changed the common law to provide for non-abatement of such actions on the federal official's death or separation from office, the Court continued (340 U.S. at pp. 19-20, 21-22): (Emphasis supplied)

> "The rule was again changed by Section 11 of

> the Judiciary Act of 1925. The provision that no action should abate was eliminated. It was provided that the action might be continued against the successor on the requisite showing within the stated period. The revision effected a substantial change. The 1925 Act made *survival* of the action dependent on a timely substitution. . . . This was a declared policy of Congress not to be altered by an agreement of the parties or by some theory of estoppel. . . . The inability of one who no longer holds the office to perform any of the official duties would indeed only be emphasized by the rendition of the coercive judgment. . . .
>
> "Nor is there any barrier to our review of this ruling on abatement by 28 U.S.C. § 2105 which prohibits a reversal by the Court of Appeals or this Court for error in ruling upon matters in abatement 'which do not involve jurisdiction.' The absence of a necessary party and the statutory barrier to substitution go to jurisdiction."

United States ex rel. Claussen v. Curran similarly held that a habeas corpus action abated where the respondent official resigned and his successor was not substituted within six months as required by Section 11 of the Judiciary Act of 1925.

These cases are readily distinguishable from the case at bar. In them, plaintiff's cause of action, as well as his suit, abated at common law when the federal official ceased to hold his office. Section 11 of the Judiciary Act of 1925 modified the common law by providing for a survival of the cause of action and the suit *only* if substitution was made against the successor officer within the statutory six months period. In other words, in those cases plaintiff's cause of action against one official survived and could be enforced against a different official only by vir-

tue of the federal statute and in accordance with its provisions.

In the case at bar, the survival of plaintiff's claim or cause of action against the defendant Remington Rand is not dependent upon federal law or upon substitution within any definite time. Under Connecticut law, the cause of action which was vested in the Birney Dysart estate survived the death of the executrix Eva Perin Dysart. (§ 8337 —Conn. Gen. Stat.—Rev. 1949, discussed *infra,* p. 39.) No Connecticut statute requires substitution to be made within a definite time in order for the cause of action to survive. And even if the present suit is abated, the cause of action is not abated. It survives. And a new action can be immediately brought and this action is not subject under Connecticut law to a defense of the statute of limitations. (See p. 31, *supra*)

There is also another important point of differentiation. In *Snyder v. Buck,* since substitution could be made only by virtue of the federal statute, and that statute barred substitution, there was an absence of a necessary party. Indeed, the new naval paymaster was an indispensable party, for only he could pay the claimed allowance.

In the case at bar, the plaintiff children, who were before the Court, became the beneficial real parties in interest within two years of Eva Perin Dysart's death and an administratrix d.b.n., c.t.a. has been added to take the bare legal title and liquidate the tax liabilities. There is no absence of a necessary or indispensable party. Indeed, all proper and necessary parties are before the Court. (See Point III D, *infra,* p. 46) And there is no statutory barrier to substitution. (See Point III C, *infra,* p. 46)

With all proper parties before the District Court, it would have been reversible error for it to refuse to proceed to judgment on the merits. *United States v. Allied Oil Corp.* (1950) 341 U.S. 1.

B. Petitioner has waived its right or is estopped to seek dismissal under the *Yungkau* doctrine.

As pointed out above, there is no statutory or jurisdictional barrier to action No. 3979 (Point II A, *supra;* and see Point III, *infra,* p. 44).

Under the *Yungkau* doctrine, Rule 25(a)(1) was likened to a "statute of limitations" which operated for the protection of the estate. But assuming arguendo that the *Yungkau* doctrine is to be perverted so that Rule 25(a)(1) is to be invoked against the estate and in favor of the defendant in a case where a defendant cannot rid itself of ultimate liability, elementary principles of law come into operation. A defendant can be estopped to assert a statute of limitations, *Lippitt v. Ashley,* 89 Conn. 451, 480 (1915). Similarly, a statute of limitations can be waived and petitioner so concedes. (Pet. p. 12)

District Judge Smith found (Petition, p. 44):

> "Defendant had knowledge of Mrs. Dysart's death early in 1946; at any time subsequent to December 30, 1947, two years after the date of death, it could have moved for dismissal pursuant to Rule 25(a)(1). The claim for dismissal was not raised, however, until defendant filed its original brief with the master, at which time lengthy and costly hearings had already been held. These hearings had started in January, 1949. If defendant had raised its claim for dismissal at that time and the motion to dismiss had been granted, the accountings would have been greatly simplified (or possibly if defendant's motion had been granted in full, rendered unnecessary) for only the interests of the three plaintiff children would have been involved. Instead the proceedings went forward on the apparent assumption that the right of recovery of the estates of Eva Perin and Birney Dysart was not questioned. Voluminous evidence

> which would have been irrelevant if the motion to dismiss had been seasonably pressed and granted, was introduced at great expense and effort to the plaintiffs. We agree with the master that by its acquiescence in allowing plaintiffs to put on full proofs, with no intimation that a claim for dismissal was going to be asserted, the defendant has procured a detrimental change in plaintiffs' position, has waived its right to have the action or any part of it dismissed under Rule 25 and is now estopped to seek dismissal."

The Second Circuit concurred (Petition, pp. 33, 34).

In view of the concurrent findings, this point of waiver and estoppel is not a proper subject for review by this Court.

Defendant's attempt to circumvent the doctrines of waiver and estoppel on the theory that Rule 25(a)(1) involves jurisdiction is answered in Point III, *infra*.

C. Petitioner's proposed application of *Yungkau* would render Rule 25(a) (1) invalid under the Rule-Making Statute and would deprive plaintiff of substantive rights under Connecticut law to which it is entitled by *Erie Railroad Co. v. Tompkins*.

Petitioner insists that dismissal is required by the "inexorable operation" of Rule 25(a) (1), which defendant cannot waive or be estopped to assert. (Petition, p. 15)

Yungkau was decided in 1947. And inasmuch as 28 U.S.C. §778 (1940) was not repealed until 1948, it was not necessary for the Court to determine whether Rule 25(a) (1), operating as "a statute of limitations," violated the Rule-Making Statute; or whether, in light of *Erie*, the Rule could be applied in a case involving State substantive rights where Rule 25(a)(1) and State law are in conflict. Petitioner's proposed application of Rule 25(a)

(1) renders the rule invalid under the Rule-Making Statute.

The statute of limitations involves a substantive right. *Guaranty Trust Co. v. York* (1945) 326 U.S. 99; *Ragan v. Merchants Transfer & Warehouse Co.* (1949) 337 U.S. 530. If then a Rule, such as 25(a)(1), has the operative effect of a statute of limitations, it violates the command of the Rule-Making Act (28 U.S.C. § 723(b) (1940), substantially carried forward as 28 U.S.C. § 2072) under which the Federal Rules were promulgated, that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 4 Moore, pp. 505, 522.

This seems to be the present view of the Court's Advisory Committee, for in its note to its proposed amendment of Rule 25(a)(1), the Committee states (May, 1954 Draft, p. 19):

> ". . . It may be questioned whether a statute of limitation may be prescribed by rule of court. At the time of the *Anderson* [Yungkau] decision this question did not arise, because the 2-year provision of the rule was substantially identical with what was then 28 U.S.C. § 778, and the right involved in the action was a federal one. Even the statute was repealed by the Revision Act of 1948, . . . Thus the rule now stands as a statute of limitations without support in the statutes. . . ."

Furthermore, petitioner's proposed application of *Yungkau* violates the principle of *Erie* in the case at bar which involves State substantive rights. For, as noted above, a statute of limitations involves a substantive right. And it is elementary that a party may waive or be estopped to assert a statute of limitations, as the lower Courts found. (See Point II B, *supra,* p. 36) If, then, a statute of limitations which is subject to the doctrine of waiver and estoppel is substantive, *a fortiori* a kindred but "inexorable"

time period in a Rule which defendant cannot waive or be estopped to assert is substantive. And where, as here proposed by petitioner, it would defeat the enforcement of State substantive rights in violation of Connecticut law, the proposed application violates *Erie*. An "inexorable" time period, then, within which substitution must be made violates substantive rights where Connecticut law does not require a peremptory dismissal for failure to make substitution within a definite time period. 4 Moore, Pars. 25.06, 25.01, 25.04.

That a Federal Rule must give way in a diversity case, where its principles are substantive in nature and run counter to state law, is clear. Under *Erie* and *Guaranty Trust,* substantive law of Connecticut must be applied. A Federal Court cannot withhold that which a state gives. *Angel v. Bullington* (1947) 330 U.S. 183.

And under Connecticut law, the claim of the Dysart estate survived; and the action did not abate for failure to make substitution within any rigid time period.

Section 8337 of the Connecticut General Statutes (Rev. 1949) reads, in part, as follows:

> "No cause or right of action shall be lost or destroyed by the death of any person but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived . . ."

This statute is both a survival statute and a non-abatement statute. The "non-abatement" feature of the statute

had its origin in a statute passed in 1753 (10 Colonial Records 207) and has been in effect in Connecticut ever since; the survival feature of this statute, has been in effect since 1848 (2 Locke & Kohn, Conn. Probate Practice, Secs. 453, 454).

The Connecticut Supreme Court has liberally construed this statute. *Hatch v. Boucher*, 77 Conn. 347 (1904), headnote states:

> "While the above statute [the predecessor of § 8337] gives an absolute right of entry within the time limited, it does not preclude the trial court, in the exercise of its discretion, from permitting the entry (of a party) at a later date for good cause shown."

This discretionary power to permit entry of an administrator after the six-months' period has been subsequently confirmed. *Craig v. Wagner*, 88 Conn. 100 (1914); *Clemens v. Harris*, 120 Conn. 111 (1935); *Dorsey v. Honeyman*, 141 Conn. 397 (1954). The Court has repeatedly looked through form and enforced the substantive rights of the parties. *Motiejaitis v. Johnson*, 117 Conn. 631 (1933).

Under Connecticut law, there is no loss of jurisdiction upon the late entry of a substituted party. *Clemens v. Harris*, 120 Conn. 111 (1935); *Bailey v. Mars*, 138 Conn. 593 (1952); *Dorsey v. Honeyman, supra.*

It is well settled law in Connecticut that upon the death of a person, the equitable title to personalty including choses in action *vests* in the legatees, distributees, or heirs-at-law, subject to being divested through payment of creditors, claims and administration expenses.

> "For almost one hundred years, this Court has recognized that the right in decedent's property, which is transmitted upon his death to his successor under the law, is a 'vested' right of this nature." *Parlato v. McCarthy*, 136 Conn. 126, 133 (1949).

And under the survivorship principle of Rule 25(a)(2) or the transfer principle of Rule 25(c), the District Court in the case at bar could have entered judgment for the three children in No. 3979 as holders of the beneficial title, since they were already parties in the consolidated action. *Miner v. Miner,* 137 Conn. 642 (1951).

The Court, however, added Isabel D. Bush, administratrix d.b.n., c.t.a. as a party plaintiff under Rule 21 and entered judgment in No. 3979 in her behalf.

This was not only proper; but with all the real parties in interest before the Court it would have been reversible error for the District Court to have done otherwise. *U. S. v. Allied Oil Corp.* (1950) 341 U. S. 1.

Petitioner's proposed application of Rule 25(a)(1) improperly applies the Rule to deal with substantive rights and in a manner that makes Connecticut law impotent.

D. Because the beneficial interest vested *within* two years of the death of the executrix, and because of other related facts, Rule 25(a) (1) must be construed in conjunction with other rules and principles; and so construed is correctly applied.

Rule 25(a)(1) cannot be read and applied in a vacuum, regardless of the facts and other Federal Rules and principles.

At the outset, Federal Rule 1 states the canon for construction:

> "They [the Federal Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 61 commands the District Court at every stage of the proceedings to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

28 U.S.C. § 2111 states similar principles for review by this Court on certiorari; and 28 U.S.C. § 2105 forbids reversal on certiorari for error in ruling upon matters in abatement of a non-jurisdictional character. (See Point IV, *infra.*)

Moreover, as noted in Point II A, *supra,* it is surely folly to grant certiorari and apply Rule 25 (a) (1) in such a manner as to defeat the final judgment on the merits.

But substitution under Rule 25(a)(1) was unnecessary. Under Connecticut law, *within* two years of the death of the plaintiff-executrix the three plaintiff children became the only beneficial parties in interest to the claim of the Dysart estate against Remington Rand as that claim descended and passed by law from both the estates of Birney Dysart and Eva Perin Dysart and can descend and pass to no one else. As such beneficial real parties in interest, under Rule 17(a) they must be held to be the proper parties to prosecute the consolidated action. State law must be applied. *Thames v. State of Missouri,* 5th Cir., 117 F. (2d) 949, cert. denied 314 U.S. 630.

> "The beneficial owner therefore is not precluded from suing nor from joining with the legal title holder *if the beneficial owner has a right sought to be enforced.* Whether he has, as we have seen, will be determined by principles of substantive law." 3 Moore, Par. 17.12, p. 1370 (Emphasis supplied)

Accordingly, the case at bar is subject to the principle of Rule 25(c) dealing with the transfer of interest *pendente lite.* 4 Moore, Par. 25.08, p. 528. Or, it is within the survivorship policy of Rule 25(a)(2) which recognizes that on the death of one or more of the plaintiffs, where the surviving plaintiffs represent the complete interest in

the claim sued on, the death need only be suggested on the record, as it was (p. 11, *supra*); and the action *shall* proceed on behalf of the surviving plaintiffs. 4 Moore, Par. 25.06.

Petitioner argues that there was at one time a defect of parties—the absence of a representative of the Birney Dysart estate to represent the estate's legal title. But the defect, if any, was cured prior to judgment by the addition under Rule 21 of Isabel D. Bush, as administratrix d.b.n., c.t.a. for tax purposes; and Petitioner makes no claim that the defect or the addition of the party prejudiced it. Clearly, then, all parties, formal, necessary or indispensable, were before the District Court prior to the rendition of its final judgment. (See Point III D, *infra*, p. 46).

The cases have taken a most liberal approach to real parties in interest and the addition of a party, where no prejudice results, as here. See *Missouri, Kansas & Texas Railway Co. v. Wulf* (1913) 226 U.S. 570 (a person could be substituted in her capacity as a personal representative, even though she took out letters as personal representative after the action was commenced in her individual capacity); *Hackner v. Guaranty Trust Co.*, 2nd Cir. (1941) 117 F. (2d) 95, 98:

> "Defendants' claim that one cannot amend a non-existent action is purely formal. . . . Actually she [plaintiff] has a claim for relief . . . no formidable obstacle to a continuance of the suit appears here, whether *the matter is treated as one of amendment or of the power of the court to add or substitute parties, Federal Rule 21,* or of commencement of a new action . . . Rule 3. . . . this action can continue with respect to Eastman without the delay and expense of a new suit which will merely bring the parties to the point where they now are." (Emphasis supplied)

See also *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 2 Cir., 200 F. (2d) 876, 879, ("Forcing plaintiff to start over will not add to or subtract from these facts; it will only cause judicial waste."); 3 Moore, Par. 21.04, pp. 2907-2908.

POINT III

Actions No. 3978 and No. 3979

FAILURE TO MAKE SUBSTITUTION DOES NOT "DIVEST THE DISTRICT COURT OF JURISDICTION."

A. Rule 82 and this Court's decisions state that the Federal Rules do not affect jurisdiction.

Rule 82, ignored by Petitioner, states clearly that the Federal "rules shall not be construed to extend or limit the jurisdiction of the United States district courts."

The Advisory Committee in recommending, and the Court in promulgating, Rule 25(a)(1) in 1937 must have proceeded on the theory that Rule 25(a)(1) is not jurisdictional.

The Court has consistently adhered to the position that the Rules cannot be jurisdictional in character. *Sibbach v. Wilson & Co.* (1941) 312 U.S. 1, 10 stated:

> "There are other limitations upon the authority to prescribe rules which might have been but which were not mentioned in the [rule-making] Act; for instance, the inability of the Court by rule to extend or restrict the jurisdiction conferred by a statute."

And although a rule has general validity, such as Rule 20 dealing with permissive joinder of parties, it will not be applied to affect jurisdiction. *U.S. v. Sherwood* (1941) 312 U.S. 584. (A private defendant cannot be joined with

the United States in a contract action where this would violate the jurisdictional provisions of the Tucker Act).

And in 2 Moore, Par 1.04[1], p. 26, it is stated:

> ". . . The Supreme Court and its Advisory Committee have adhered to the self-imposed conditions that no rule should extend or limit the jurisdiction of the district courts or the venue of actions therein."

And the Advisory Committee presently considers Rule 25(a)(1) as in the nature of a statute of limitations and *not* jurisdictional. See Advisory Committee's Note in its May, 1954 Draft, p. 38, *supra.*

There was and is jurisdiction of these removed actions on the basis of diversity. Rule 25(a)(1) does not involve "jurisdiction of the subject matter" (Petition, p. 13) and hence Petitioner's contention that such jurisdiction is not subject to waiver or estoppel is wholly irrelevant to the facts of the case at bar.

B. *Anderson v. Yungkau* did not construe Rule 25(a)(1) as jurisdictional.

Relying upon the Court's statement in *Yungkau* that the Rule operates "as a mandate to the Court to dismiss", Petitioner asks this Court to construe *Yungkau* as making Rule 25(a)(1) jurisdictional, so that a failure to comply therewith "divest[s] the District Court of jurisdiction". (Petition, pp. 2, 10, etc.) As previously pointed out (see Point II A, *supra,* p. 29) the Court in Yungkau was dealing with a reconciliation of Rule 25(a)(1), and Rule 6(b) on the enlargement of time, in a case involving a *federal* matter. It held Rule 25(a)(1) to operate as a statute of limitations for the protection of a defendant estate; and that the District Court could not in its discretion enlarge that time period under Rule 6(b). In

other words, the District Court did not have discretionary power to turn a "statute of limitations" into a doctrine of laches. This Court, in *Yungkau,* in keeping with the mandate of Rule 82, did not give any jurisdictional effect to Rule 25(a)(1).

C. 28 U.S.C. § 778 (1940), dealing with failure to make substitution, was repealed in 1948.

Yungkau was decided in 1947. 28 U.S.C. § 778 (1940) was repealed in 1948 by the Judicial Code. H. Rep. No. 308, 80th Congress, 1st Session, A239 (1947); 4 Moore, Par. 25.01 [4], [7].

Whatever statutory barrier to substitution there may have been, exists no longer. There is no congressional policy requiring a dismissal of either action No. 3978 or No. 3979.

D. All necessary or indispensable parties are before the Court.

In Action No. 3978, there was no problem of substitution. (See Point I A, *supra.*)

Upon Eva Perin Dysart's death, the plaintiff children became the beneficial real parties in interest in No. 3979, were before the Court in the consolidated case, and no substitution for Eva Perin Dysart, as executrix, was necessary. One of the plaintiff children was added as administratrix d.b.n., c.t.a. to liquidate the tax liability of the Birney Dysart estate. (See Point II B, C, *supra.*)

Thus, whether she be regarded as a formal, proper, necessary or indispensable party, once she was joined the action could not be dismissed. *Greenleaf v. Safetrails, Inc.,* 2 Cir., 140 F. (2d) 889; *Keene v. Hale-Halsell Co.,* 5 Cir., 118 F. (2d) 332, 335; 3 Moore, Pars. 19.07, 19.08, 19.10, 19.19, 21.04.

No necessary or indispensable party was absent which

required a dismissal as in *Snyder v. Buck; United States ex rel. Claussen v. Curran.* (See Point II A, *supra.*)

With all the proper, necessary or indispensable parties before the Court, it would have been reversible error for the District Court to have dismissed either action No. 3978 or No. 3979. *U.S. v. Allied Oil Corp.* (1950) 341 U.S. 1.

POINT IV

Actions No. 3978 and No. 3979

THIS COURT IS PRECLUDED FROM REVERSING EITHER JUDGMENT.

A. 28 U.S.C. § 2111 and related principles of harmless error forbid reversal.

Failure, if any, to comply with Rule 25(a)(1) did not divest the District Court of jurisdiction. (See Point III, *supra.*)

Rule 61 on harmless error states that the District Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties". And 28 U.S.C. § 2111 commands that

> "On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

The very purpose of this statute is to prevent judgments on the merits from being reversed for some omission, such as the failure to make an unnecessary substitution, as here, where all the real parties in interest were and are before the Court.

Since Petitioner does not contend that it was preju-

diced by the alleged error, then certainly the error, if any, was harmless.

B. Petitioner has no valid interest or concern as to how the proceeds of recovery against it shall be divided.

The discussion on this point under Point I C (4) applies equally to action No. 3979.

C. Judgment nunc pro tunc could have been entered as of a time subsequent to the interlocutory judgment of July 18, 1941, and prior to Eva Perin Dysart's death on December 30, 1945 to prevent a failure of justice where the delay was attributable to defendant's wrong.

An interlocutory judgment adjudging the defendant liable and ordering it to account was rendered by the District Court on July 18, 1941. This was approximately 4½ years prior to the death of Eva Perin Dysart, who died, on December 30, 1945, during the pendency of the long accounting proceedings necessitated by the defendant's wrongful failure to perform its contract.

The cases have taken a remedial and practical approach in similar situations by ordering the entry of a judgment nunc pro tunc in order to prevent a failure of justice where the delay is not attributable to the deceased party, or is attributable to the wrong of the adverse party. *Mitchell v. Overman* (1880) 103 U.S. 62, 64-65; *Harris v. C.I.R.* (1950) 340 U.S. 106; 6 Moore, Par. 58.08.

Hennessy v. Denihan (1930) 110 Conn. 646, states at pp. 648, 649:

> "Had the Court known of his death it could still have entered its decree *nunc pro tunc,* dating it back to a day subsequent to the hearing and prior to the date of his death. . . . His death did not de-

> prive the Court of jurisdiction and the judgment thereafter rendered was merely irregular."

A judgment nunc pro tunc in action No. 3979 could have been entered in the amount awarded Isabel D. Bush as administratrix d.b.n., c.t.a. and the defendant would not have been prejudiced a single penny.

The District Court, in lieu of entering a judgment nunc pro tunc, added Isabel D. Bush administratrix d.b.n., c.t.a. as party-plaintiff in action No. 3979 under Rule 21. The Second Circuit affirmed. No prejudicial error has been asserted by Petitioner. If we assume, arguendo, that the District Court erred, the error was harmless.

D. 28 U.S.C. § 2105 forbids a reversal for error in ruling upon non-jurisdictional matters of abatement.

As pointed out *supra* (p. 47), error, if any, was harmless. At most, it involved matter in abatement and not in bar, for defendant cannot rid itself of its ultimate liability. (See Point II A, *supra.*)

In *Snyder v. Buck,* the absence of and impossibility of adding a necessary or indispensable party deprived the Court of power or jurisdiction to proceed. In the case at bar, however, all formal, proper, necessary and indispensable parties were before the Court. Under these circumstances, the Court had the power or jurisdiction to proceed. (See Point III D, *supra.*) Hence, if the District Court's refusal to abate either action was error, it was harmless and did not involve jurisdiction.

Under these circumstances, 28 U.S.C. § 2105 applies. It states:

> "There shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

CONCLUSION

It is respectfully submitted that the Petition presents no jurisdictional or other error for review. The Second Circuit correctly followed and applied *Anderson v. Yungkau* to the facts of these cases and correctly construed and applied the applicable Federal Rules and statutes.

There is no question for review in action No. 3978.

There is no matter of substance for review in action No. 3979. If there was any failure to observe all procedural niceties in this action, it was harmless procedural error involving matter in abatement of a non-jurisdictional character.

The judgments have accorded the plaintiffs the rights to which they are entitled under Connecticut substantive law. Judicial economy demands that after 17 years, the plaintiffs be permitted to enjoy the fruits of their judgments.

Respondents, therefore, respectfully request this Court to deny the Petition for Certiorari in both actions No. 3978 and No. 3979.

Dated: Hartford, Connecticut, September 28, 1954.

Respectfully submitted,

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APPENDIX

Federal Rules of Civil Procedure

"*Rule 1. Scope of Rules.* These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Connecticut General Statutes (Rev. 1949)

"*Sec. 8332. Accidental failure of suit; when new action is allowable.* If any action, commenced within the time limited by law, shall have failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the writ was abated, or shall have been erased from the docket for want of jurisdiction, or the action shall have been otherwise avoided or defeated by the death of a party or for any matter of form; or, if, in any such action after a verdict for the plaintiff, the judgment shall have been arrested, or, if a judgment of nonsuit shall have been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff be dead and the action by law survive, his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. When any action shall have been brought against an executor or administrator or continued against an executor or administrator after the death of the defendant and shall have failed for any of the causes above mentioned, the plaintiff, or his executor or administrator in case a cause of action shall survive, may commence a new action within six months after such determination of the former

one. If an appeal be had from any such judgment to the supreme court of errors, the time such case is pending upon such appeal shall be excluded in computing the time as above limited. The provisions of this section shall apply to any defendant who shall file a cross-complaint in any action, and to any action between the same parties or the legal representatives of either of them for the same cause of action or subject of action brought to any court in this state, either before dismissal of the original action and its affirmance or within one year after such dismissal and affirmance, and to any action brought to the United States circuit or district court for the district of Connecticut which shall have been dismissed without trial upon its merits or because of lack of jurisdiction in such court, and, in case such action shall be within the jurisdiction of any state court, the time for bringing such action to such state court shall commence from the date of such dismissal in the United States court, or, if an appeal or writ of error shall have been taken from such dismissal, from the final determination of such appeal or such writ of error."

"*Sec. 8337. Survival of actions and causes of actions.* No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive in favor of or against the executor or administrator of such deceased person. No civil action or proceeding shall abate by reason of the death of any party thereto, but it may be continued by or against the executor or administrator of such decedent. In case of the death of any party plaintiff, his executor or administrator may enter within six months thereafter and prosecute the suit in the same manner as his testator or intestate might have done if he had lived; and, in case of the death of any party defendant, the plaintiff, within one year thereafter, may have a writ of scire facias against such decedent's executor or administrator to show cause why judgment should not be rendered against

him, which shall be served at least twelve days before the day upon which it is returnable, and upon its return the action may proceed. The provisions of this section shall not apply to any cause or right of action or to any civil action or proceeding the purpose or object of which is defeated or rendered useless by the death of any party thereto; nor to any civil action or proceeding whose prosecution or defense shall depend upon the continued existence of the persons who are plaintiffs or defendants; nor to any civil action upon a penal statute."

"Sec. 7041. Removal, resignation or death of fiduciary, and appointment of successor. When any executor or administrator or any other person acting in a fiduciary capacity shall become incapable of executing his trust, or neglect to perform the duties thereof, or waste the estate in his charge, the court of probate having jurisdiction may remove him, after notice and a hearing, on its own motion, or upon the application and complaint of any person interested or of the surety upon his probate bond, and such court, after notice and hearing, may act upon and accept or reject the written resignation of any such person; but no such resignation shall be accepted until such person shall have fully and finally accounted for the administration of his trust to the acceptance of such court. Upon the death, removal or acceptance of the resignation of any such person before the completion of his duties, such court of probate may appoint a suitable person to fill the vacancy caused thereby, who shall give a probate bond, and all suits in favor of or against any such person shall survive to and may be prosecuted by or against the person appointed to succeed him. Trustees appointed by a testator to execute a trust created by will and testamentary guardians may resign or be removed, and the vacancies filled in like manner by the court having jurisdiction, unless otherwise provided by the will."